Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

DONALD G. FORD AND SANDRA H. FORD, PETITIONERS,

v.

UNITED STATES, RESPONDENT.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the "interstate commerce" element of the federal money laundering laws, 18 U.S.C. § 1956(a)(1)(B)(i) and 18 U.S.C. § 1957, which cover transactions involving a "financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree," is satisfied merely by showing that the defendant deposited funds in a state-chartered bank insured by the FDIC.

2. Whether the court of appeals properly applied *Koon* v. *United States*, 518 U.S. 81 (1996), when it held, without considering the nature or severity of petitioner's conduct, that their conduct fell within the "heartland" of a federal sentencing guideline because it constituted the underlying criminal offense.

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PETITION FOR A WRIT OF CERTIORARI

Donald G. Ford and Sandra H. Ford respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals (App., *infra*, 1a-38a) is reported at 184 F.3d 566. The judgments and decisions of the district court (App., *infra*, 43a-59a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 23, 1999. On October 8, 1999, the court of appeals denied petitioners' requests for panel rehearing and suggestions of rehearing *en banc*. App., *infra*, 41a-42a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. §§ 1956, 1957, and 3553(b) are reproduced at App., *infra*, 57a-69a. United States Sentencing Guidelines ("U.S.S.G.") ch. 1, pt. A, and §§ 2S1.1, 2S1.2, and 5K2.0 are reproduced, in pertinent part, at App., *infra*, 70a-80a.

STATEMENT

This case presents the important and recurring question of whether the "interstate commerce" element of the federal money laundering laws, which requires that transactions involve a "financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree," can be satisfied simply by showing that a state-chartered financial institution was insured by the FDIC. This Court will decide this very question, in the context of the federal arson statute, in *Jones* v. *United States*, No. 99-5739. This case also provides an ideal opportunity for the Court to resolve the widespread confusion over how to apply the

"heartland" framework articulated by this Court in *Koon* v. *United States*, 518 U.S. 81 (1996).

A. In *Jones* v. *United States*, No. 99-5739, this Court agreed to resolve the sharp disagreements of the courts of appeals over the proper meaning of the "affecting commerce" element of federal criminal statutes. Applying a rule similar to that in *Jones*, the court of appeals below held that this element of the federal money laundering laws was automatically satisfied by evidence that the state-chartered institution in question was insured by the FDIC — even though there was no evidence that FDIC insurance ever was triggered or that the bank engaged in any interstate financial transactions. That holding, while in accord with decisions of the Fourth Seventh, Second and Tenth Circuits, irreconcilably conflicts with those of the Fifth and Eighth Circuits as well as a decision of another panel of the Second Circuit, which held that evidence of interstate insurance is insufficient to meet the interstate commerce requirements of analogous federal statutes.

This Court's decision in *Jones* will likely resolve this issue. The Court should thus await its disposition of the first question presented here pending its ruling in *Jones*. However, should *Jones* somehow fail to resolve this issue, the Court should grant the petition, which provides an ideal opportunity to resolve the long-standing split over whether interstate insurance, standing alone, meets the jurisdictional requirements of numerous federal laws that require proof of transactions affecting interstate commerce.

B. This case also presents an important and recurring question regarding the application of the framework set forth in *Koon* v. *United States*, 518 U.S. 81 (1996), for determining whether conduct falls outside the "heartland" of specific sentencing guidelines. The court of appeals, acknowledging a split among the courts of appeals, held that petitioners' conduct

fell within the heartland of the federal money laundering sentencing guideline simply because the conduct was covered by the money laundering laws they were convicted of violating. This deprived the trial court of the power to depart from that guideline, even though petitioners' conduct, *i.e.*, the deposit of funds in a state bank, was incidental to the underlying offense of operating a gambling enterprise (which is covered by a far less severe guideline), and despite the Sentencing Commission's 1997 Report to Congress confirming that the heartland of the money laundering guideline was meant to target drug enterprises and organized crime — not the sort of atypical "receipt and deposit" conduct here.

In holding that "heartland" departures are forbidden in money laundering cases so long as a defendant's conduct falls within the scope of the money laundering statute, regardless of the source of the funds, the Sixth Circuit followed the lead of the First and Eleventh Circuits. See *infra* at 15-16. The Second, Third, Fifth and Eighth Circuits, by contrast, have squarely rejected this categorical approach, holding instead that heartland departures are proper, even if a defendant's conduct is otherwise covered by the money laundering laws, so long as the conduct is incidental to the commission of another offense unrelated to drug trafficking or organized crime. See *infra* at 16 & cases cited therein.

The prejudice to petitioners resulting from this circuit split is readily apparent. Indeed, only seventeen days after writing the opinion *in this case*, Judge Gibson, sitting by designation in the Third Circuit, held that conduct materially identical to that alleged here fell *outside* the heartland of the money laundering guideline because it did not involve drug trafficking or organized crime. The diametrically opposite courses that Judge Gibson took in *Smith* and in this case

effectively *quadrupled* Mr. Ford's sentence and more than *doubled* Mrs. Ford's sentence.

As this case vividly demonstrates, the federal courts are hopelessly divided as to how to perform the heartland analysis called for by 18 U.S.C. § 3553, or how to apply the framework articulated by this Court in *Koon*. That such uncertainty and arbitrariness should permeate the application of the U.S. Sentencing Guidelines — a set of rules designed specifically to reduce uncertainty — is intolerable. Only by granting the petition can the Court resolve this confusion.

C. Petitioners were convicted and sentenced to prison terms of 108 and 41 months for running a bingo hall used to raise money for charitable organizations, including the Veterans of Foreign Wars, the Knights of Columbus and the American Legion. Based on petitioners' failure to comply with various technical requirements imposed by state law for running a charitable gaming operation, and their deposit of the gaming proceeds into a local state-chartered bank (as required by Kentucky law), petitioner Donald Ford was charged with two counts of conducting an illegal gambling business, in violation of 18 U.S.C. § 1955, twenty-nine counts of engaging in monetary transactions in criminally derived property, in violation of 18 U.S.C. § 1957, and four counts of money laundering in violation of 18 U.S.C. § 1956(a)(1)(B)(i). His wife, petitioner Sandra Hutchins Ford, was charged with two counts of engaging in monetary transactions in criminally derived property based on her signing of two checks — checks also signed by Mr. Ford and that she did not even need to sign — as well as two counts of conducting an illegal gambling business. Petitioners never took any money from the bingo operation for their personal use.

To establish that petitioners violated the federal money laundering statutes (18 U.S.C. §§ 1956 and 1957), the

government was required to prove that the alleged transactions involved a "financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree." 18 U.S.C. § 1956(c)(4)(B). To prove this element, the government relied entirely on the fact that the bank in which petitioners deposited proceeds of the bingo operations, the state-chartered Bank of Louisville, was insured by the FDIC. The district court, over petitioners' objection, instructed the jury that it could infer the requisite effect on interstate commerce from this fact. App., *infra*, 44a.

On November 22, 1996, the jury found Mr. Ford guilty on two § 1955 counts, twenty-six § 1957 counts, and one § 1956 count. The jury also found Mrs. Ford guilty on one § 1955 count and two § 1957 counts. Petitioners moved for acquittal on the money laundering counts based on the government's failure to prove that the bank had engaged in conduct affecting interstate commerce. The district court rejected this claim, holding that "proof that an institution is F.D.I.C. insured justifies the inference that there is an effect on interstate commerce." App., *infra*, 44a.

At their sentencing hearing, petitioners moved for a downward departure because their conduct fell outside the "heartland" of the money laundering guidelines. The district court held that it had no legal authority to depart downward because petitioners' conduct fell within the "heartland" of the money laundering guidelines. App., *infra*, 44a-49a. The court stated, however, that it would consider departing downward if the court of appeals held that petitioners' conduct fell outside the "heartland." App., *infra*, 48a, 56a. The court sentenced both petitioners at the bottom of the sentencing range. App., *infra*, 53a, 56a-57a.

Petitioners appealed their convictions to the Sixth Circuit, arguing, *inter alia*, that they should have been acquitted

of all money laundering counts based on the government's failure to prove the interstate commerce element. The court of appeals rejected this contention on the ground that "use of federally insured banks * * * to facilitate the money laundering create[s] a sufficient nexus to commerce to allow application of § 1956." App., *infra*, 28a (quoting *United States* v. *Owens*, 159 F.3d 221, 226 (6th Cir. 1998), cert. denied, 120 S. Ct. 56 (1999)).

Petitioners also challenged the district court's holding that petitioners' conduct fell within the heartland of the money laundering guideline.[1] As in the district court, petitioners argued that the money laundering statutes were aimed at combating the use of financial transactions to conceal proceeds of drug and organized crime operations, and that their conduct (which involved no such activity) was therefore atypical of that which the guideline targeted, thus empowering the district court to consider a downward departure. Petitioners also cited the Sentencing Commission's 1997 *Report to the Congress: Sentencing Policy for Money Laundering Offenses, including Comments on Department of Justice Report* (United States Sentencing Comm'n, (Sept. 18, 1997)), which confirmed that the heartland of the money laundering guideline was meant to "penalize the conduct about which Congress seemed most concerned when it enacted the money laundering statutes," *i.e.*, "situations in which the 'laundered' funds [were] derived from serious underlying criminal such as a significant drug trafficking operation or organized crime." Pet. C.A. Br. 42.

While acknowledging contrary decisions from other circuits, the court of appeals affirmed petitioners' sentence.

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[1] Petitioners argued in the court of appeals that if "Appellants' alleged conduct, if an offense at all, fell under the gambling guideline, U.S.S.G. § 2E3.1." Pet. C.A. Br. 44.

Joining the Eleventh Circuit in *United States* v. *Adams*, 74 F.3d 1093, 1101-1102 (11th Cir. 1996), the Sixth Circuit held that petitioners' conduct, *i.e.*, the documented depositing into a local bank of bingo proceeds, could not support a downward departure as a matter of law because the money laundering statutes punish more than "classic money laundering." App., *infra*, 35a (internal quotations omitted). The court of appeals also refused to consider the Sentencing Commission's 1997 Report to Congress on the ground that under 18 U.S.C. § 3553(b), courts can consider only "the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission . . . when determining whether a factor was adequately taken into consideration" by the Sentencing Commission. App., *infra*, 36a. Because the Sentencing Commission's report did not fit into any of these categories, the court held that it could not be considered in making a heartland determination. The court also held that application of the money laundering guideline to cases not involving drugs or organized crime was already taken into consideration by the Sentencing Commission, and petitioners thus could not be eligible for a heartland departure "*merely* because [their conduct] involves gambling proceeds." App., *infra*, 36a (emphasis in original). The court of appeals thus affirmed the district court's finding that it lacked legal authority to depart from the money laundering guideline. *Ibid.*

REASONS FOR GRANTING THE PETITION

I. THE SIXTH CIRCUIT'S HOLDING THAT FDIC INSURANCE ALONE IS SUFFICIENT TO SATISFY THE INTERSTATE COMMERCE ELEMENT OF THE MONEY LAUNDERING LAWS RAISES IMPORTANT QUESTIONS OF LAW OVER WHICH THE COURTS OF APPEALS ARE DEEPLY DIVIDED.

The decision below raises the fundamental question of whether proof of interstate insurance (in this case FDIC

insurance) *by itself* is sufficient to establish the interstate commerce element of the federal money laundering laws. This Court has granted certiorari to decide a similar question in *Jones* v. *United States*, No. 99-5739, and thus should hold the petition as to the first question presented pending its ruling in *Jones*. Should *Jones* fail to resolve that question, this case provides an ideal opportunity to put this vitally significant and broadly applicable controversy to rest.

A. The Courts Of Appeals Are Deadlocked As To Whether Proof Of Interstate Insurance Alone Is Sufficient To Establish Conduct "Affecting Interstate Commerce."

This case, like *Jones* v. *United States*, No. 99-5739, involves a sharp circuit split over the proper interpretation of the "affecting commerce" element used in numerous federal criminal statutes. Like the federal arson statute in *Jones*, the money laundering statute requires that the alleged money laundering activity involve an institution which is "engaged in, or the activities of which affect, interstate or foreign commerce." 18 U.S.C. § 1956(c)(4)(B). See also 18 U.S.C. § 844(i) (arson statute requiring that property be used "in interstate or foreign commerce" or "in any activity affecting interstate or foreign commerce").

Federal courts have divided over laundering and the arson contexts, to determine whether interstate insurance alone is sufficient to make the insured bank or property "in" or "affecting" interstate commerce. The court below, like the Fourth, Seventh and Tenth Circuits, held that the statutory language of "affect[ing] interstate * * * commerce" is satisfied merely by proof of interstate insurance. App., *infra*, 28a (interstate insurance sufficient). See also *Jones* v. *United States*, 178 F.3d 479, 480 (7th Cir.) , cert. granted, 120 S. Ct. 494 (1999) (No. 99-5739); *United States* v. *Kunzman*, 54 F.3d

1522, 1527 (10th Cir. 1995) (same); *United States* v. *Peay*, 972 F.2d 71, 74-75 (4th Cir. 1992) (same). The Second, Fifth and Eighth Circuits, by contrast, have held that proof of interstate insurance is insufficient to establish that the insured bank or property is "in" or "affecting" interstate commerce. See, *e.g.*, *United States* v. *Johnson*, 194 F.3d 657, 662 (5th Cir. 1999); *United States* v. *Voss*, 787 F.2d 393, 397 (8th Cir. 1986); *United States* v. *Barton*, 647 F.2d 224, 232 (2d Cir. 1981).[2]

The circuit split over the sufficiency of interstate insurance as establishing the "affecting commerce" element in federal criminal statutes likely will be resolved in *Jones* v. *United States*. The lower court in *Jones* rested its "affecting commerce" finding on proof of not only interstate insurance, but also the receipt of natural gas and electricity. *Jones*, 178 F.3d at 480. To the extent that the government failed to prove that the arson in *Jones* "affected commerce," the government's reliance on even slimmer proof here — interstate insurance alone — must also fail. Indeed, the petition for a writ of certiorari in *Jones* specifically argued that "[r]esolution of the question [in that case] could affect the application of [other] statutes" — specifically mentioning 18 U.S.C. § 1956. See Pet. for Cert., *Jones* v. *United States*, No. 99-5739, at 23. Because

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[2] The government previously has attempted to downplay this circuit split by positing a distinction between interstate insurance by the FDIC and interstate insurance by private insurers. See, *e.g.*, *Peay*, 972 F.2d at 74-75. But this distinction is untenable. All that was required or proven here, as in the arson cases like *Jones*, was the simple fact of interstate insurance. Indeed, the government here offered no evidence whatsoever that the state-chartered bank engaged in any interstate transactions, that money ever crossed state lines, or that any claim was ever made by the bank on the FDIC insurance fund. To the extent that being insured by the FDIC (which paid no claim here) could ever cause greater effects on interstate commerce than insurance by an out-of-state insurer, no such proof was required by the courts below. See App., *infra*, 26a-28a.

this Court's ruling in *Jones* will likely govern the correctness of the interstate commerce holding below, the Court should, at a minimum, hold this portion of the petition pending its decision in *Jones*, and then rule on the petition accordingly.

B. The Sixth Circuit's Interstate Commerce Holding Conflicts With This Court's "Interstate Commerce" Decisions.

The Sixth Circuit's holding that FDIC insurance alone is sufficient to satisfy the "affecting commerce" element of the federal money laundering statutes cannot be squared with this Court's long-standing rulings concerning the meaning of such federal jurisdictional requirements.

As this Court has repeatedly explained, "[t]he task of resolving the dispute over the meaning of [a statute] begins where all such inquiries must begin: with the language of the statute itself." *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). In this case, the statutory text of the money laundering laws makes clear that the financial institution at issue must do more than maintain passive connections with interstate commerce. Instead, the government must prove that the financial institution actually "engaged in" or has "activities * * * which affect, interstate or foreign commerce in any way or degree." 18 U.S.C. § 1956(c)(4)(B). The language here is virtually identical to language in other statutes which this Court has construed as requiring goal-oriented, instrumental conduct, not mere passive receipt of insurance. See, *e.g.*, *FERC* v. *Mississippi*, 456 U.S. 742, 757 (1982) (retail and wholesale sale of electrical services "affects" interstate commerce); *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 277 (1981) (coal mining "affects" interstate commerce); *Perez* v. *United States*, 402 U.S. 146, 154 (1971) (extortionate credit transactions "affect" interstate commerce).

The court of appeals below did not require the government to prove that any funds moved across state lines, that FDIC officials or other banks were affected by the alleged money laundering, or that the depositing of funds by petitioner had any effect that extended beyond the state-chartered Bank of Louisville. Plainly, the basis of the court's theory is that the mere fact of insurance from the federal government alone is enough to "affect" commerce. This novel theory not only stretches the term "affect" to the breaking point, but also eviscerates the terms "engaged in" and "activities." "Judges should hesitate * * * to treat [as surplusage] statutory terms in any setting, and resistance should be heightened when the words describe an element of a criminal offense." *Ratzlaf* v. *United States*, 510 U.S. 135, 140-141 (1994). In drafting the money laundering statutes, Congress specifically chose to include an "affecting commerce" requirement, and that choice must be respected.

The petitioner in *Jones* similarly argues in his merits brief that passive receipt of services, including insurance services, cannot be reconciled with the active involvement in commerce that Congress chose to require when it employed the terms "activity affecting interstate or foreign commerce." Pet. Br., *Jones* v. *United States*, No. 99-5739, at 17-27 (quoting 18 U.S.C. § 844(a)). This Court's resolution of the statutory issue in *Jones* will necessarily affect the interpretation here of an almost identical provision. Compare 18 U.S.C. § 844(i) (property must be used "in interstate or foreign commerce" or "in any activity affecting interstate or foreign commerce") (arson), with 18 U.S.C. § 1956(c)(4)(B) (financial institution must be "engaged in, or the activities of which affect, interstate or foreign commerce") (money laundering). Accordingly, this Court should hold this portion of the petition pending its decision in *Jones,* and then rule on the petition accordingly.

C. The Sixth Circuit's Interstate Commerce Holding Raises Important and Recurring Questions of Law That Merit Supreme Court Review.

This Court already implicitly recognized the importance of resolving the meaning of the terms "activities . . . affect[ing] interstate or foreign commerce" when it granted the petition for a writ of certiorari in *Jones*. As explained in the *Jones* petition, the significance of this question lies in the fact that numerous other federal criminal statutes — including the money laundering statute at issue here — contain similar "in or affecting commerce" requirements. See Pet. Br., *Jones* v. *United States*, No. 99-5739, at 23 & n.9, citing, *inter alia*, 15 U.S.C. § 1173 (requiring the registration of "any person engaged in the business of manufacturing gambling devices if the activities of such business in any way affect interstate or foreign commerce"); 18 U.S.C. § 922(g)(1) (prohibiting possession of firearms or ammunition "in or affecting commerce"); 18 U.S.C. § 1951(a) (barring use of robbery or extortion to "obstruct[], delay[], or affect commerce"); 18 U.S.C. § 1962 (prohibiting the use of income derived from a pattern of racketeering or collection of an unlawful debt for investment in an enterprise "the activities of which affect [] interstate * * * commerce").

Like *Jones*, this case reflects the increased federalization of criminal law — not merely through new statutes, but through "remarkably expansive" applications of the jurisdictional elements in existing statutes. Frickey, *The Fool on the Hill: Congressional Findings, Constitutional Adjudication, and* United States v. Lopez, 46 CASE W. RES. L. REV. 695, 701 (1996). This increased federalization of crime has significant practical consequences with the criminal caseload in federal courts having doubled since 1980. Rehnquist, *The 1998 Year-End Report on the Federal Judiciary*, at 13 n.2 (1999); Mengler, *The Sad Refrain of Tough on Crime: Some Thoughts on Saving*

the Federal Judiciary from the Federalization of State Crime, 43 U. KAN. L. REV. 503, 505 (1995).

This Court has granted review in *Jones* to consider the expansive reading of the arson statute's "affecting commerce" provision. If it determines, as petitioners in *Jones* suggest, that the government's interpretation of "affecting commerce" is overly broad, this finding should serve as a corrective measure for other interpretations of similar federal criminal statutes. Certainly such a holding would affect the lower courts' broad application of federal money laundering statutes to allow the federal government to prosecute crimes against state banks without requiring *any* actual effect on interstate commerce. Should the Court's ruling in *Jones* fail to resolve this issue, this case provides an ideal vehicle to resolve this important and long-standing controversy. In any event, the Sixth Circuit's interstate commerce holding must be reversed.

II. THE COURT OF APPEALS' HOLDING THAT PETITIONERS' CONDUCT FALLS WITHIN THE HEARTLAND OF THE MONEY LAUNDERING GUIDELINE CONFLICTS WITH DECISIONS OF OTHER CIRCUITS AND OF THIS COURT.

A. The Courts Of Appeals Are Deeply Divided Over The Legal Standard For Determining Whether Conduct Falls Within The Heartland Of Specific Sentencing Guidelines.

Although sentencing judges are required to sentence offenders in accordance with the Sentencing Guidelines, they may depart from the Guidelines if "the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. § 3553(b). The Guidelines deal with atypical cases that

fall within the literal reach of specific guidelines by authorizing what are known as "heartland" departures:

> The Commission intends the sentencing courts to treat each guideline as carving out a "heartland," a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted.

1996 U.S.S.G. ch.1, pt. A, intro. comment 4(b). See also 1996 U.S.S.G. § 5K2.0.

In *Koon* v. *United States*, 518 U.S. 81 (1996), this Court described the process that courts must follow when considering whether to depart downward from the sentence dictated by the applicable sentencing guideline.

> [A] sentencing court considering a departure should ask the following questions:
> (1) What features of this case, potentially, take it outside the Guidelines' "heartland" and make of it a special, or unusual, case?
> (2) Has the Commission forbidden departures based on those features?
> (3) If not, has the Commission encouraged departures based on those features?
> (4) If not, has the Commission discouraged departures based on those features?

Koon, 518 U.S. at 95 (quoting *United States* v. *Rivera*, 994 F.2d 942, 949 (1st Cir. 1993)). The Sentencing Commission has prohibited consideration of only a few factors (none of which are applicable here). Otherwise, sentencing courts are free to depart based on factors not adequately taken into account

by the Sentencing Commission when it formulated the guideline in question. If a factor is unmentioned in the Guidelines, the court must, "after considering the 'structure and theory of both relevant individual guidelines and the Guidelines taken as a whole,' [*Rivera*, 994 F.2d at 949], decide whether it is sufficient to take the case out of the Guideline's heartland." *Koon*, 518 U.S. at 96.

In affirming petitioners' sentences, the court of appeals acknowledged that the circuits are split over the basic question of how to perform the "heartland" analysis articulated in *Koon*. The court also recognized that the circuits have split over whether money laundering activity falls outside the heartland of the money laundering guideline if it does not involve the concealment of drug trafficking or organized crime proceeds. In holding that such conduct falls within the heartland, the Sixth Circuit followed similar decisions of the First and Eleventh Circuits, both of which held that district courts lack legal authority to depart from the money laundering guidelines even where the conduct in question does not qualify as "classic money laundering." App., *infra*, 35a (citing *United States* v. *Adams*, 74 F.3d 1093, 1102 (11th Cir. 1996); *United States* v. *LeBlanc*, 24 F.3d 340, 346-347 (1st Cir. 1994)).

The holdings of the First, Sixth and Eleventh Circuits irreconcilably conflict with rulings of the Second, Fifth and Eighth Circuits, each of which have held that conduct (like petitioners') falls outside the heartland of the money laundering guideline if the funds were merely deposited with a financial institution and were not procured through drug trafficking or organized crime. App., *infra*, 34a (citing *United States* v. *Woods*, 159 F.3d 1132, 1134-1135 (8th Cir. 1998); *United States* v. *Hemmingson*, 157 F.3d 347, 361-363 (5th Cir. 1998); and *United States* v. *Caba*, 911 F. Supp. 630 (E.D.N.Y. 1996), *aff'd*, 104 F.3d 354 (table), 1996 WL 685764, at *3 (2d Cir. Nov. 29, 1996)). See also *United States* v. *Skinner*, 946 F.2d

176, 179-181 (2d Cir. 1991) (money laundering conduct resembling petitioners' alleged conduct here fell outside the heartland of the money laundering guideline). Contrary to the categorical approach adopted by the First, Sixth and Eleventh Circuits, the Second, Fifth and Eighth Circuits reflect a heartland framework that requires district courts to evaluate the typicality of each defendant's particular conduct.

That the circuits are so confused over how to determine whether specific conduct falls within the heartland of a sentencing guideline — in particular, whether such determinations should be made by examining the defendant's particular conduct rather than by looking to the literal reach of the statute of conviction — is untenable. The Sentencing Guidelines are meant to bring consistency and reason to the federal sentencing process. See *Koon*, 518 U.S. at 92 (discussing the legislative history of the Sentencing Reform Act of 1984). Although *Koon* went a long way toward bringing rationality and consistency to departure cases, it is clear that confusion still pervades the courts of appeals, and therefore that further Supreme Court review is necessary to clarify precisely how the heartland framework articulated in *Koon* is to be applied.

Had petitioners been sentenced in the Second, Fifth or Eighth Circuits, they clearly would have been eligible for a guideline departure. Mr. Ford's conduct under § 1957 consisted of twenty-three transactions involving $1,137,338.12. C.A. J.A. 1573. Other courts of appeals have authorized heartland departures from the money laundering guideline in "receipt and deposit" cases involving far greater amounts where the funds were not derived from drug trafficking or organized crime.[3] In

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[3] "Receipt and deposit" cases are "those in which the money laundering conduct is limited to depositing the proceeds of unlawful activity in a

Caba, for instance, the Second Circuit affirmed a downward departure in a case involving the deposit of *over $11 million* in food stamps in connection with a scheme to defraud the food stamp system. *Caba*, 911 F. Supp. at 632, *aff'd*, 104 F.3d 354 (table), 1996 WL 685764, at *3 (labeling the district court's decision to depart "exactly the kind of analysis of typical cases encouraged by the Guidelines"). As in *Caba*, Mr. Ford's transactions were thoroughly documented, confirming that there was never any attempt to conceal the source of any funds. See *Caba*, 911 F. Supp. at 636-637.

The prejudice to petitioners is even more glaring in Mrs. Ford's case. Mrs. Ford was convicted of signing two checks — checks for which her signature was not even required — totaling $94,000. App., *infra*, 30a. In *United States* v. *Smith*, 186 F.3d 290, 299-300 (3d Cir. 1999), a case decided a mere seventeen days after the opinion below, the Third Circuit (with Judge Gibson, *the author of the opinion below,* on the panel) reversed the trial court's refusal to consider a downward departure because the defendant's conduct — *i.e.*, depositing *fifteen* checks totaling $120,000 (more than *seven times* the number Mrs. Ford was convicted of signing) and the attempted concealment of the source of the funds (which petitioners never were accused of) — fell outside of the heartland of the money laundering guideline because "the heartland of U.S.S.G. § 2S1.1 is the money laundering activity connected with extensive drug trafficking and serious crime," and because the sending of the checks there was only an "incidental by-product"

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financial institution account identifiable to the person who committed the underlying offense." *Woods*, 159 F.3d at 1135. See also H.R. Rep. No. 104-272, at 14-15 (1995), reprinted in 1995 U.S.C.C.A.N. 335, 348-49 (describing "the application of the current guidelines to receipt-and-deposit cases" as potentially "problematic" and as "past sentencing anomalies arising from relatively few cases").

of the underlying conduct. Here, it is equally clear that petitioners' conduct had nothing to do with "drug trafficking" or "serious crime," and that petitioners' receipt and deposit of funds, not to mention Mrs. Ford's mere signing of two checks, was only incidental to petitioners' bingo operation.[4]

Furthermore, the defendant in *Smith* attempted to conceal the true source of the funds. Here, by contrast, even the government's own witness testified that petitioners' transactions were well-documented and showed no effort to conceal — a factor that courts often have used in determining whether conduct falls within the heartland of the money laundering guidelines. See *Caba*, 911 F. Supp. at 636-637 (deposit of over $11,000,000 in mishandled food stamps outside of the heartland because no intent to conceal the source of the funds); *United States* v. *Threadgill*, 172 F.3d 357, 377-378 (5th Cir.) (laundering of $500,000 atypical because the laundering was incidental to defendant's underlying gambling actives), cert. denied, 120 S. Ct. 172 (1999).

The foregoing circuit split has developed because the courts of appeals have disagreed not only as to the *framework* for conducting a heartland analysis, but also over the *sources* that trial courts can consider in making heartland determinations. In this case, petitioners argued below that their conduct fell outside the heartland of the money laundering guideline based in part on the Sentencing Commission's *Report to the Congress: Sentencing Policy for Money Laundering*

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[4] That Mrs. Ford's conduct falls outside the heartland of the money laundering guidelines is also confirmed by the fact that her signatures were legally irrelevant to the negotiability of the checks. Mr. Ford also signed the checks for which Mrs. Ford was convicted, and because the checks were for more than $2,000, Mr. Ford's signature was both necessary and sufficient under the account on which they were drawn to make them valid. See *United States* v. *Skinner*, 946 F.2d 176, 179-180 (2d Cir. 1989).

Offenses, including Comments on Department of Justice Report (Sept. 18, 1997). This Report confirmed that the heartland of the money laundering guidelines was meant to "penalize the conduct about which Congress seemed most concerned when it enacted the money laundering statutes" — in particular, "situations in which the 'laundered' funds [were] derived from serious underlying criminal activities such as a significant drug trafficking operation or organized crime," and cases where the financial transactions were undertaken to "make it appear that the funds were legitimate." See Pet. C.A. Br. 42.

Some courts of appeals, like the Third, Fifth and Eighth Circuits, have relied prominently on this Report in ascertaining the "heartland" of the money laundering guideline. See, *e.g.*, *Woods*, 159 F.3d at 1135-1136; *Hemmingson*, 157 F.3d at 363 n.18. Indeed, the Third Circuit in *Smith* explicitly relied on the Sentencing Commission's Report as having "explained the heartland of the money laundering guideline." 186 F.3d at 300. The Sixth Circuit below, however, held that the Report was irrelevant to the heartland determination because, under 18 U.S.C. § 3553(b), courts can only consider the "guidelines themselves, the official commentary, and the policy statements" in making heartland determinations. App., *infra*, 36a.[5]

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[5] The Sixth Circuit's holding that courts may only consider the sources enumerated in § 3553(b) when making heartland determination clearly conflicts with the practices of other circuits, which routinely consider a wide variety of sources in evaluating heartland claims. In the money laundering context, for instance, there are a myriad of sources considered by other circuits that the Sixth Circuit would exclude from the heartland analysis. See, *e.g.*, *Woods*, 159 F.3d at 1135-1136 (considering the Sentencing Commission's Sept. 17, 1997 report, H.R. Rep. No. 104-272, at 14-15, reprinted in 1995 U.S.C.C.A.N. 335, 348-349 (the report of the House committee recommending rejection of the Sentencing Commission's proposed amendments to the money laundering guidelines contained in the Sentencing Commission Report), and *Report for the Senate and House Judiciary*

The impact of this conflict on petitioners is especially severe. Indeed, only two weeks after writing the opinion below holding that the Sentencing Commission's 1997 Report was categorically irrelevant to the heartland question, Judge Gibson[6] joined in the Third Circuit's decision in *Smith*, 186 F.3d at 297-300, which held that the defendant's money laundering activity fell *outside* the heartland of the money laundering guideline and *prominently relied* upon the Sentencing Commission's Report and other sources not listed in 18 U.S.C. § 3553(b) — the very sources *expressly forbidden* by the Sixth Circuit.[7]

Had petitioners been prosecuted in a circuit where materials such as the Sentencing Commission Report could be considered, it is virtually certain that a district court would have recognized its legal authority to depart. In *Smith*, for instance, the Third Circuit concluded that the defendant, whose offense was far more serious than Mrs. Ford's, was eligible for a heartland departure because the defendant's conduct did not

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Committees on the Charging and Plea Practices of Federal Prosecutors with Respect to the Offense of Money Laundering, Dep't of Justice (June 17, 1996) (a Department of Justice report on how it makes money laundering charging decisions)); *Hemmingson*, 157 F.3d at 362 (relying on Dep't of Justice, FEDERAL PROSECUTION OF ELECTION OFFICERS (6th ed. 1995)).

[6] Judge Gibson, author of the opinion below and member of the Third Circuit panel in *Smith* was sitting by designation in both cases. His home circuit, the Eighth is aligned with the Third Circuit on this issue, and the *Smith* panel, in reaching its holding, relied heavily on the Eighth Circuit's opinion in *Woods*. See *Smith*, 186 F.3d at 299.

[7] Like the Eighth Circuit in *Woods*, the Third Circuit in *Smith* also looked to the House Report recommending rejection of proposed amendments by the Sentencing Commission and the June 17, 1996 report written by the Department of Justice, as well as another document issued by the Sentencing Commission, News from the U.S. Sentencing Commission, "Money Laundering Guidelines Scrutinized" (Jan. 1998). See *Smith*, 186 F.3d at 298-299.

involve funds derived from "drug trafficking or serious crime." *Smith*, 186 F.3d at 298 (also noting the imposition of severe sentences for "money laundering conduct [] so attenuated as to be virtually unrecognizable as the type of conduct for which the original money laundering sentencing guidelines were drafted." (quoting the Sentencing Commission Report at 6-7)).

The Sentencing Guidelines were promulgated to avoid such arbitrary outcomes. In any event, the fact that courts of appeals could reach such completely inconsistent results on the purely legal question of whether a district judge has the *authority* to depart from application of a sentencing guideline — a question that served to *double* Mrs. Ford's sentence and *quadruple* Mr. Ford's sentence — is plainly intolerable, and can only be resolved by this Court's review.

B. The Court Of Appeals Applied The Wrong Legal Standard And Analysis In Holding That Petitioners' Conduct Fell Wihtin The Heartland Of The Federal Money Laundering Guideline.

The Sixth Circuit held that petitioners' conduct fell within the heartland of the federal money laundering guideline simply because the statute they were convicted of violating, 18 U.S.C. § 1957, covers more than "classic money laundering."[8] The court also refused to consider any source not listed in 18 U.S.C. § 3553(b) in making its heartland determination, including the Sentencing Commission's 1997 Report to Congress, which specifically described the scope of the heartland of the money laundering guidelines. App., *infra*, 35a-

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[8] Mr. Ford was also convicted of violating 18 U.S.C. § 1956(a)(1)(B), but the value of the funds relevant for Mr. Ford's § 1957 conviction increased his offense level to the point of exceeding the level applicable to his § 1956 conviction.

36a. In so doing, the court plainly misapplied this Court's decision in *Koon* v. *United States*, 518 U.S. 81 (1996).

1. The Court explained in *Koon* that the deferential standard of review given to sentencing courts derives from the intensely factual nature of the "heartland" inquiry:

> Whether a given factor is present to a degree not adequately considered by the Commission, or whether a discouraged factor nonetheless justifies departure because it is present in some unusual or exceptional way, are matters determined in large part by comparison with the facts of other Guidelines cases.

Id. at 98. *Koon* reiterated the importance of considering the facts of each case in determining whether a particular factor is present to an unusual degree: "The relevant question is not, as the Government says, 'whether a particular factor is within the "heartland"' as a general proposition but whether the particular factor is within the heartland *given all the facts of the case.*" *Id.* at 99-100 (emphasis added).

In this case, however, the Sixth Circuit made its determination of whether petitioners were eligible for a heartland departure not by referring to the facts of their case, or by comparing the nature and gravity of their conduct to that which Congress targeted when it enacted the money laundering statutes. Instead, the court conducted the heartland inquiry as a matter of law, holding petitioners' conduct fell within the heartland of the money laundering statutes because those laws extended beyond "classic money laundering," and that petitioners' conduct did not fall outside the heartland of the money laundering guideline "*merely* because it involves

gambling proceeds." App., *infra*, 36a (emphasis in original).[9] But asking generically whether the deposited proceeds came from "gambling" completely misses the point of the heartland analysis. The question under *Koon* is whether petitioners' *specific conduct* fell within the heartland of the guideline — a point that was altogether ignored by the court of appeals.

The Sixth Circuit's approach may have been motivated by a fear that giving the district court authority to consider a heartland departure would negate the effect of the money laundering conviction. But that is exactly what heartland departures are for; if the sentencing court determines that an offender's conduct does not fit within the typical conduct targeted by the guideline, it negates the impact of the conviction to which the guideline would otherwise apply. See *Smith*, 186 F.3d at 300 (reversing application of the money laundering guideline and ordering application of the guideline for the underlying activity on remand). The Sixth Circuit's categorical prohibition against such sentencing adjustments would preclude heartland departures altogether regardless of the offender's particular conduct. To say that an offender's conduct has been *criminalized* says nothing of whether that conduct falls outside the heartland of the cases envisioned by the Sentencing Commission. Indeed, the offender's conduct *must* have been criminalized in order to trigger the sentencing process in the first place. As the Fifth Circuit recently explained in affirming the downward departure from the money laundering guideline:

> The government's argument amounts to a claim that the money-laundering statute facially applies

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[9] The Sixth Circuit is not alone in employing this sort of flawed and overly simplistic analysis. See also *LeBlanc*, 24 F.3d at 346 (reversing a departure because the "language of the statute * * * indicates that Congress intended to criminalize a broad array of transactions designed to facilitate numerous federal crimes"); *Adams*, 74 F.3d at 1102.

> to the defendants' conduct—a point no one contests. As such, the government's challenge fails to engage the fundamental premise of the district court's reasoning: that Hemmingson's and Ferrouillet's conduct, when viewed alongside the conduct that is usually prosecuted under the money-laundering statutes, was atypical.

Hemmingson, 157 F.3d at 362.

This Court's decision in *Koon* was crafted to eliminate rules that would prevent a sentencing court from evaluating the facts and circumstances of each offender's particular conduct. Notwithstanding *Koon*, the Sixth Circuit decided that petitioners' conduct fell within the heartland simply because the application note to those guidelines "references section 1961(1) [the definitional statute], which includes operation of a gambling business." App., *infra*, 34a. All that this shows, however, is that petitioners' alleged conduct was covered by the underlying criminal statute. The fact that petitioners' conduct is covered by the money laundering statute, however, is only the beginning of the heartland inquiry, not the end.

By defining the "'heartland,' a set of typical cases embodying the conduct that each guideline describes" (1996 U.S.S.G. ch.1, pt. A, intro. comment 4(b)) simply by reference to the elements of the underlying offense, the Sixth Circuit (and the other courts of appeals that it followed) simply ignored the fundamental holding of *Koon* that the "relevant question" is "whether the particular factor is within the heartland given all the facts of the case." 518 U.S. at 99-100.

2. To lie beyond the "heartland" of a statute or guideline, an offender's conduct must be "atypical" of the conduct that the Sentencing Commission considered in formulating the guideline. *Koon*, 518 U.S. at 94 ("Atypical

cases were not 'adequately taken into consideration,' and factors that may make a case atypical provide potential bases for departure") (quoting 1995 U.S.S.G. § 5K2.0). It is this determination that governs the sentencing court's power to authorize a downward departure. 18 U.S.C. § 3553(b); 1996 U.S.S.G. § 5K2.0.

It follows, then, that in heartland cases it is critical for sentencing and reviewing courts to evaluate a defendant's particular conduct to determine "whether the misconduct that occurred in the particular instance suffices to make the case atypical." *Koon*, 518 U.S. at 100. District courts are uniquely situated to make such a determination, "informed by [their] vantage point and day-to-day experience in criminal sentencing." *Id.* at 98.

It is therefore remarkable that the Sixth Circuit would deny sentencing courts access to a wide variety of relevant sources in helping them make the critical typicality determination. In this case, the Sentencing Commission's 1997 Report provides unmistakable guidance concerning the conduct that falls withiin the heartland of the money laundering guideline. Indeed, other circuits have looked to this Report for precisely that reason. See, *e.g.*, *Smith*, 186 F.3d at 299-300; *United States* v. *Anderson*, 82 F.3d 436, 440 (D.C. Cir. 1996) (report by the Sentencing Commission was similar to "a report by a learned society").[10]

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[10] This case is in a completely different posture than was the case in *Braxton* v. *United States*, 500 U.S. 344, 347-49 (1991). In *Braxton*, this Court refused to review one of Braxton's issues because, since the time this Court granted certiorari, the Sentencing Commission had requested public comment on the Guideline at issue. *Id.* at 348. The guidelines at issue here are at the opposite extreme; the Commission already attempted to alter and clarify them, but failed. Indeed, since the publication of the Commission's 1997 Report to Congress, the circuit split described above has only

In refusing to consider the Sentencing Commission's Report, the Sixth Circuit mistakenly assumed that in making heartland determinations, "U.S.C. § 3553(b) limits our consideration to the guidelines themselves, the official commentary and the policy statements." App., *infra*, 36a. Yet, while the Sentencing Commission cannot alter the content of the Guidelines by issuing a report to Congress, there is *nothing* in § 3553(b) that prevents courts from relying on any relevant source in determining whether conduct is "atypical."

The Sixth Circuit's reading of § 3553(b) also cannot be squared with this Court's admonition in *Koon* that "[b]efore a departure is permitted, certain aspects of the case must be found unusual enough for it to fall outside the heartland of cases in the Guideline. To resolve this question, the district court must make a refined assessment of the many facts bearing on the outcome, informed by its vantage point and day-to-day experience in criminal sentencing." *Koon*, 518 U.S. at 98. Section 3553(b) cannot plausibly be read as limiting the sources a sentencing court can look to in gauging its "vantage point" and "day-to-day experience in criminal sentencing." Indeed, if the Sixth Circuit's holding is left to stand, the "refined assessment" required by *Koon* would be rendered a meaningless formality.

For all of the foregoing reasons, the Sixth Circuit's sentencing holding should be reversed.

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deepened. It is in just such cases, where the Commission is the least likely to resolve the conflict among the courts of appeals, that Supreme Court review is needed the most.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 97-6097, 97-6270, 97-6271

UNITED STATES OF AMERICA, *Plaintiff-Appellee*,

v.

DONALD G. FORD (97-6097/6270); SANDRA HUTCHINS FORD (97-6271), *Defendants-Appellants*.

Argued: October 29, 1998.

Decided and Filed: July 23, 1999.

Appeal from the United States District Court
for the Western District of Kentucky at Louisville.
Nos. 93-00081; 93-0082—Charles R. Simpson, III, Chief District Judge.

Before: NELSON, CLAY, and John R. GIBSON,[*] Circuit Judges.

OPINION

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[*] The Honorable John R. Gibson, Circuit Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

JOHN R. GIBSON, Circuit Judge.

Don Ford and his wife, Sandra Hutchins Ford,[1] appeal their convictions for operation of an illegal gambling business, 18 U.S.C. § 1955 (1994), and money laundering, 18 U.S.C. §§ 1957 (1994) (both defendants) and 1956(a)(1)(B)(1994) (Ford only). Ford also appeals his conviction under 26 U.S.C. § 7206(1) (1994) for filing a false income tax return. Both raise numerous claims of error in denying various motions and in sentencing. Ford and Hutchins raise Fourth Amendment issues concerning the search of Ford's bingo hall and another building. They also contend that the district court erroneously determined that there were no permissible bases for departure from the Guidelines sentencing range. We reverse Ford's tax conviction because it is based on evidence that was seized in violation of his Fourth Amendment rights. We affirm Ford's and Hutchins's gambling and money laundering convictions, but remand Ford's case for resentencing in light of the reversal of his tax conviction.

Don Ford owned and operated the Arcade Bingo Plaza, which was in the business of conducting bingo games for the benefit of charities. Under Kentucky law, it is illegal to promote gambling (which includes bingo) other than "charitable gaming" subject to complex rules that were amended twice during the time periods relevant to this case. See Ky. Rev. Stat. Ann. §§ 528.010(10) (Michie 1985); 1990 Ky. Rev. Stat. and R. Serv. ch. 469 (Banks-Baldwin) (effective July 13, 1990); 1992 Ky. Rev. Stat. and R. Serv.

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[1] The Fords married after the crimes in this case were committed. To make it easier to distinguish between the defendants, we will refer to Sandra Hutchins Ford as Hutchins, which was her name at the time of the events in question.

ch. 461 (Banks-Baldwin) (effective April 13, 1992). Throughout the time in question, gambling could only be legal "charitable gaming" if it was operated by a tax exempt organization; if that organization had maintained tax exempt status for five years before the gaming; if the gaming was conducted exclusively by unpaid volunteers for the charity; and if the proceeds were used solely for the charitable purposes of the organization. During various times there were many other requirements for the conduct of charitable gaming, including a limitation of $5,000 per day in prizes and limitations on the number of days and hours per week the organization could conduct gaming.

Ford first operated the Arcade Bingo Plaza in Louisville, Kentucky in 1990, conducting bingo games for various charities, such as the Knights of Columbus. Ford would charge the charities rental and overhead for use of the hall. Hutchins was Ford's second in command at the Arcade Plaza, and when he was not there she conducted the business. Instead of using volunteers from the sponsoring charities to run the bingo games in accordance with Kentucky law, Ford hired workers. The workers were paid from money "cut" or "skimmed" from the bingo proceeds. The skim was made by the controller for the session, then given to Hutchins. The workers were paid in cash, often surreptitiously handed to them in a handshake. The amount of money skimmed varied with the size of the crowd, because the more players there were, the larger the amount that could be skimmed without the players detecting the diminution of the prize money. Sometimes there was cash left over from the skim after the workers were paid; this money would be put in the safe in "Mr. Ford's compartment."

In November 1990 Ford sold the Arcade Plaza to his employee Clay Ballinger, for $1 down and $249,999 in credit. Ford had no further role in the operation of the bingo hall,

except to collect payments from Ballinger, until the end of 1991.

At that time Ford came up with the idea of controlling his own charitable sponsor. Ford bought the Arcade Plaza back from Ballinger. Ford reactivated a lapsed post of the Regular Veterans Association on December 16, 1991. Later, he registered several other RVA Posts and suborganizations. Because of the statutory limitations on the number of sessions one organization could sponsor and the amount of prize money an organization could award in one day, once the limits had been reached for one RVA sponsor, Ford would substitute another RVA sponsor. At a Christmas party for the Arcade workers in 1991, Ford told the workers that the RVA was going to sponsor bingo games at the Arcade Plaza. The workers testified that Ford expected them to join the RVA in order to work at the Arcade Plaza. Bingo patrons at the hall were invited to join the RVA, and the RVA subsidized their $5 dues with a bingo pass worth $5.

Ford made himself treasurer and Sandra Hutchins secretary of the RVA entities he controlled. Ford and Hutchins were the signatories on the various RVA bank accounts. The other officers were Ford's employees or long-time associates who had virtually no knowledge of the RVA posts' operation or function. For instance, Clay Ballinger was president of one post, although he couldn't say which. He testified at trial, "To this day, I really can't tell you what RVA is." Roy Bunch, president of RVA Post No. 1, stated: "I was President of the club, but I had no position ... Well, I had no authority, let's put it that way."

After the RVAs began sponsoring bingo at the Arcade Plaza, the method of paying non-RVA charitable sponsors changed. Rather than the old system of paying the sponsors the net proceeds, Ford and Hutchins began paying a flat fee

of $500 in the form of a check and $500 cash "discreetly" handed to the sponsor's representative. The result of the new system was that the non-RVA sponsors made less and the Arcade Plaza kept more of the proceeds. In addition, Ford began giving the RVA the proceeds of the pull-tab games sold by vendors on the bingo floor during other sponsors' sessions.

After Kentucky law was changed in April 1992 to forbid the award of more than $5,000 in prizes in one day, 1992 Ky. Rev. Stat. and R. Serv. ch. 461, Hutchins altered Arcade Plaza records to eliminate any record of prizes exceeding the $5,000 limit.

After police executed a search warrant on the Arcade Bingo Plaza and the RVA Hall across the street, Ford and Hutchins were indicted on two counts of operating a gambling business in violation of state law, 18 U.S.C. § 1955. Ford was also indicted on twenty-eight counts of engaging in monetary transactions in criminally derived property for transactions involving gambling proceeds, 18 U.S.C. § 1957; three counts of engaging in transactions undertaken to disguise the nature, location, source, ownership or control of criminally derived money, 18 U.S.C. § 1956(a)(1)(B)(i) and (ii); and one forfeiture count. Hutchins was indicted on two counts of engaging in monetary transactions with criminally derived proceeds, 18 U.S.C. § 1957, and one forfeiture count. (Offenses under both section 1956 and section 1957 are referred to as "money laundering" offenses.)

Ford was also indicted in a separate case of eleven counts of tax offenses completely unrelated to the bingo operation. During the search of the RVA Hall at 2902 South Seventh Street Road, across from the Arcade Plaza, police seized documents that had no relation to the bingo operation, including files from 1984 to 1988 relating to a real estate transaction known as the "Huber's deal." In the Huber's

deal, Ford had sold land to Huber's, Incorporated for $1.5 million, in the form of $400,000 down and a note for $1.1 million. Ford sold the $1.1 million note to his accountant for $800,000 and took a $300,000 loss from the sale transaction on his 1986 income tax. The accountant paid Ford for the note with the proceeds of a bank loan; simultaneously, Ford used the $800,000 to purchase a certificate of deposit which Ford pledged to secure the accountant's bank loan. When Huber's paid the $800,000, the accountant paid off the loan and the bank released its lien on Ford's certificate of deposit. The accountant then assigned the Huber's, Inc. note back to Ford, who eventually received the remaining $330,969.33 payment from Huber's, Inc. in 1988. Ford did not report that payment as income on his 1988 tax return.

After a jury trial on the gambling and money laundering charges, Ford was convicted of both gambling counts, twenty-six counts of section 1957 money laundering and one count of section 1956 money laundering. Hutchins was convicted of one of the gambling counts and two counts of section 1957 money laundering. In the separately tried tax case, Ford was convicted of one count of filing a false income tax return, 26 U.S.C. § 7206(1), for failing to report income on his 1988 return.

Ford was sentenced to twenty months' imprisonment in the tax case, and 108 months in the gambling and money laundering case, to be served concurrently with each other. Hutchins was sentenced to forty-one months' imprisonment. Both appeal from their convictions and their sentences.

I.

Ford contends that the search of his buildings violated his Fourth Amendment rights because the warrant was not sufficiently particular and because federal agents improperly took advantage of a search conducted under a state warrant.

Louisville Police Department officers conducted the search under a state warrant based on an affidavit. Three IRS agents also assisted in executing the warrants. The affidavit supporting the warrant described the Louisville Police Department's investigation of Donald Ford's bingo operations. Police had visited the Arcade Bingo Plaza building, where Donald Ford and his subordinates Sandra Hutchins and Clay Ballinger conducted bingo games, which they claimed were for the benefit of charities. The affidavit described numerous violations of the statutory requirements for charitable gaming, such as payment of the "volunteer" workers, payment of prizes exceeding $5,000 per day, and operation of bingo games supposedly sponsored by charities that had no representatives present during the game. The affidavit also stated facts indicating that the RVA sponsors were actually shells having no charitable or fraternal function, but existing only as alter egos of Donald Ford. The affiant recited facts that would support an inference that Hutchins and Ballinger had taken home the proceeds from the bingo games, and that Ford kept numerous lock boxes at various banks containing cash.

The warrant contained ten clauses listing items to be seized. Some of the clauses were expressly limited by reference to illegal gambling or bingo. However, some clauses had no such limitation, in particular the category authorizing seizure of: "Books, records, receipts, bank statements and records, money drafts, letters of credit, money orders and cash checks, money wrappers, passbooks, bank

checks, automatic teller machine receipts, Western Union receipts, safety deposit box keys, and other items evidencing the obtaining, secreting, transfer, and/or concealment of assets and the obtaining, secreting, transfer, concealment and or expenditure of money."

The police executing the warrant seized several file cabinets and eleven boxes of documents. The officer in charge testified at the suppression hearing that they seized "basically most of the documents" at 2902 South Seventh. Another officer agreed that they "pretty much took everything." Many of the documents related to Ford Industries and Durrett Investigations, auto-financing and private investigation businesses, respectively, also owned by Ford. Among the documents seized were promissory notes, deeds, and related papers, all dated between 1984 and 1988, concerning the Huber's deal, which was completely unrelated to the gambling operation.

The search took place in the late night and early morning of August 28 and 29, 1992. The documents seized were kept at the Louisville Police headquarters until September 23, when they were transferred to the IRS offices. In November 1992, the IRS officially obtained custody of the documents by grand jury subpoena.

A.

The tax prosecution was based on documents seized in the August 28-29 search. Ford moved to suppress the documents on the grounds that if the documents were within the scope of the search warrant, the search warrant was overbroad, and if the search warrant was read narrowly enough to be valid, the documents were not within its scope. The government did not contend that the warrant should be narrowed by construction, *see Andresen v. Maryland*, 427 U.S. 463, 480-81 (1976), and therefore limited to documents related to bingo. Instead, the

government contended that it needed all Ford's financial documents in order to determine his "overall financial picture" and thus establish what money he had available, where the money came from, and what happened to it. This could require law enforcement officials to go back "ten years or more." Therefore, according to the government, the warrant properly permitted seizure of all financial documents in the buildings, whether or not related to the bingo operations in time or subject matter.

The magistrate judge recommended that the warrant be held valid "in view of the complex nature of the investigation, the pervasive presence of fraud, and the inability of the investigating officers to determine more specifically what items would be subject to seizure."[2/] The district court conducted a de novo review and held that the affidavit on which the warrant was based "implicitly established" that Ford's organization was "permeated with fraud" and that the warrant was therefore not overbroad, citing *United States v. Oloyede*, 982 F.2d 133, 141 (4th Cir.1993).

We review de novo the district court's conclusion on the overbreadth issue. *United States v. Durk*, 149 F.3d 464, 465 (6th Cir.1998) (deciding whether description of premises was overbroad); *Davis v. Gracey*, 111 F.3d 1472, 1478 (10th Cir.1997) (deciding whether description of items to be seized was overbroad).

The Fourth Amendment guarantees that "no Warrants shall issue, but upon probable cause, supported by Oath or

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[2/] The magistrate did identify three clauses that contained no limitation either to gambling or money as "arguably" overbroad; however, no evidence was seized under those clauses, so there was nothing to suppress.

affirmation, and *particularly* describing the place to be searched, and the persons or things to be seized." (Emphasis added.) The particularity requirement prohibits the issuance of warrants that would let officers seize "one thing under a warrant describing another." *Davis*, 111 F.3d at 1478 (quoting *Marron v. United States*, 275 U.S. 192, 196 (1927)). "A general order to explore and rummage through a person's belongings is not permitted." *United States v. Blakeney*, 942 F.2d 1001, 1026 (6th Cir.) (quotation omitted), *cert. denied*, 502 U.S. 1008.

The degree of specificity required in a warrant depends on what information is reasonably available to the police in the case. *Id.* at 1027. A general description may suffice when the police could supply no better information, but fail when a narrower description was available. *Id.* In particular, when the suspect himself has made it difficult to describe particularly the items to be seized, a broad warrant is permissible. *See United States v. Bentley*, 825 F.2d 1104, 1110 (7th Cir.) (criminal enterprise does not get extra protection from the Fourth Amendment by choosing a form of operation that generates huge amounts of paper), *cert. denied*, 484 U.S. 901 (1987); *United States v. London*, 66 F.3d 1227, 1238 (1st Cir. 1995) (general search permitted where suspect had mingled legitimate business documents with documents probative of crime), *cert. denied*, 517 U.S. 1155 (1996).

We have recently upheld a warrant containing a paragraph identical to the broadest language in the warrant before us ("Books, records, receipts, bank statements and records, money drafts, letters of credit, money orders and cashier's checks, money wrappers, passbooks, bank checks, automatic teller machine receipts, Western Union receipts, safety deposit box keys, and other items evidencing the obtaining, secreting, transfer, and/or concealment of assets and the obtaining,

secreting, transfer, concealment and/or expenditure of money"). In *United States v. Ables*, 167 F.3d 1021 (6th Cir.), *cert. denied*, --- U.S. ----, 1999 WL 319434 (June 21, 1999), another Louisville bingo hall search case, we held that the language quoted above did not authorize a general search. *Id.* at 1033-34. Notably, there was no suggestion in *Ables* that the warrant was used to seize documents that could not have pertained to bingo proceeds.

However, in this case, the quoted language authorized a broader search than was reasonable given the facts in the affidavit supporting the warrant. The affidavit stated that the first of Ford's RVA posts was incorporated in December 1991, and there was no indication in the affidavit of criminal activity before that date. The affidavit described an investigation beginning on April 24, 1992. It also reported an interview with Clay Ballinger, who said he had operated the bingo himself but had "sold the Arcade Plaza Bingo back to Mr. Ford in 1991." However, the police seized promissory notes, deeds, and related papers dated between 1984 and 1988, which had no relation to the bingo operation. In *Blakeney* a warrant authorizing a search for "jewelry" was overbroad because the agent applying for the search warrant had available an inventory of the specific items of jewelry that had been stolen. 942 F.2d at 1027. Failure to limit broad descriptive terms by relevant dates, when such dates are available to the police, will render a warrant overbroad. *United States v. Cardwell*, 680 F.2d 75, 78 (9th Cir. 1982); *United States v. Abrams*, 615 F.2d 541, 545 (1st Cir. 1980)("A time frame should also have been incorporated into the warrant."); *In re Application of Lafayette Academy*, 610 F.2d 1, 6 (1st Cir.1979). We have held as much in an unpublished case. *United States v. Nagalingam*, No. 97-6433, 1998 WL 739822, at *3 (6th Cir. Oct. 6, 1998); *see also United States v. Sissler*, No. 91-2113, 1992 WL 126974,

at *6-7 (6th Cir. June 10, 1992), *cert. denied*, 506 U.S. 1079 (1993).

The government argues that it was necessary to seize documents antedating the bingo operation to establish what money Ford had before the bingo business started. This would help the government to identify which of his present assets could be bingo proceeds. This argument would allow virtually unlimited seizure of a lifetime's worth of documentation, which is extremely intrusive. Moreover, the impracticability of tracing the origin of every dollar Ford owned to show whether it came from some enterprise other than bingo, casts doubt on whether the government really means to take on such a herculean task. At any rate, this rationale was not articulated in the affidavit, and therefore we need not decide whether it would have provided a justification for the warrant if it had been presented to the magistrate. *See Lafayette Academy*, 610 F.2d at 6 n.9 (rejecting justification for the seizure of records predating offense as being unsupported in affidavit).

Similarly, we reject the government's argument that it seized the Huber's, Inc. documents because the storage of Ford's personal documents at the RVA Hall showed Ford and the RVA were alter egos. Again, this argument would allow an extreme intrusion for evidence of very little probative value. The government at trial used the documents for an entirely different purpose than simply to prove that they were stored at the RVA Hall.

The government further argues that there was probable cause to seize all the documents at the RVA Hall because the business carried on there was "permeated with fraud." Other circuits have upheld extremely broad warrants on such a theory. *E.g., United States v. Humphrey,* 104 F.3d 65, 69 (5th Cir.), *cert. denied*, 520 U.S. 1235 (1997); *Oloyede*, 982

F.2d at 140-41; *United States v. Sawyer*, 799 F.2d 1494,1508 (11th Cir.1986), *cert. denied*, 479 U.S. 1069, (1987); *United States v. Kail*, 804 F.2d 441, 445 (8th Cir.1986); *United States v. Brien*, 617 F.2d 299, 309 (1st Cir.), *cert. denied*, 446 U.S. 919 (1980). The affidavit definitely contained evidence that Ford was abusing the form of charitable organizations in order to run bingo games for personal profit. However, the affidavit did not disclose any reason to believe that the scheme began before December 1991, the date given in the affidavit as the date when Ford reactivated his first RVA post. Even if one business carried on at a site is permeated with fraud, if other businesses run at the same site are separable and are not shown to be related to the suspected crime, a warrant permitting seizure of all documents at the site is not justified. *Voss v. Bergsgaard*, 774 F.2d 402, 406 (10th Cir. 1985); *Bentley*, 825 F.2d at 1110. As in *Voss*, 774 F.2d at 405, the overbreadth of the warrant in this case is illustrated by the items actually seized under it--here, documents dating from years before the bingo operation began and which pertain to an entirely unrelated crime.

The government argues that even if the warrant was overbroad, the documents relating to the Huber's, Inc. deal would inevitably have been discovered in the course of the IRS's pending civil investigation of Ford's 1988 tax return. Under the inevitable discovery doctrine, illegally seized evidence may be admitted despite the exclusionary rule if the government can prove that it would have obtained the evidence from lawful sources even if the illegal seizure never happened. *United States v. Kennedy*, 61 F.3d 494, 499 (6th Cir.1995), *cert. denied*, 517 U.S. 1119 (1996). The government can prove this either by showing that "an independent, untainted investigation ... inevitably would have uncovered the same evidence or [by showing] other compelling facts establishing that the disputed evidence

inevitably would have been discovered." *Id.* Application of this doctrine necessarily requires some speculation about what would have happened if events had unfolded differently than they did. *United States v. Leake*, 95 F.3d 409, 412 (6th Cir. 1996). However, we must keep speculation at a minimum by focusing on "demonstrated historical facts capable of ready verification or impeachment." *Id.* (quoting *Nix v. Williams*, 467 U.S. 431, 444-45 n.5, (1984)). The government can satisfy its burden by showing that routine procedures that police would have used regardless of the illegal search would have resulted in the discovery of the disputed evidence. *Kennedy*, 61 F.3d at 500. However, if the defendant shows that the police were not in fact following those routine procedures in the particular case, the government's evidence about what police *would have done* must bow to contrary evidence about what they *actually did*. For instance, in *Leake*, 95 F.3d at 418 n.17 and 418 n.19, the government argued that police would inevitably have acted on certain leads. However, the evidence showed that the police did not in fact take action on those leads in a "reasonably timely manner," 95 F.3d at 418 n.17, and therefore the court held that the government had not carried its burden of proving inevitable discovery.

The district court's application of the inevitable discovery rule is a mixed question of fact and law which we review de novo. *Kennedy*, 61 F.3d at 497.

In this case, before the illegal search took place, the IRS had issued a notice of deficiency to Ford for the 1988 tax year, based on his claimed net operating loss carryforward from 1986. Ford petitioned the United States Tax Court for relief on November 2, 1992, contending that the IRS had incorrectly disallowed the net operating loss carryforward. On December 28, 1992, the IRS filed an answer conceding the case: "[R]eview of taxpayer's records, not available to

respondent's agent at the time notice was issued, has persuaded respondent that petitioners' 1988 return was substantially correct as filed."

At the suppression hearing, the government did not call William Shouse, the IRS attorney who had actually handled the tax court case. Instead, it called another IRS attorney, Jennifer Decker, who did not handle the Ford suit, and asked her what she would have done had she been handling the case. She testified about how she would have tracked down the same documents that were illegally seized, obtaining them from IRS files and from Huber's, Inc., if Ford did not produce them. The district court credited this testimony in holding that the seized documents would have inevitably been discovered without the illegal search.

Here, the testimony about what the IRS would have done in investigating this case is inconsistent with what the IRS actually did--it conceded the correctness of Ford's position, undertook no discovery in the case, and ultimately entered an agreed dismissal of the case. As in *Leake*, the record does not substantiate the government's claim that it was hot on the trail of the disputed evidence. The government has not carried its burden of proving the inevitability of discovery.

We therefore hold that the documents seized from 2902 South Seventh Street Road pertaining to the Huber's deal, the sale of the Huber's note to the accountant and the accountant's reassignment of the note to Ford must be suppressed because they were seized in violation of Ford's Fourth Amendment rights.[3/] Ford's tax conviction must be reversed.

[3/] The government does not argue that the Huber's, Inc. documents should be admitted under the good faith exception to the exclusionary rule. *See United States v. Leon*, 468 U.S. 897 (1984); *United States v. Savoca*, 761 F.2d 292, 295-96 (6th Cir.), *cert. denied*, 474 U.S. 852 (1985). Even

B.

Ford and Hutchins contend that the district court should have suppressed the evidence seized in the August 28-29 search in the gambling case as well as the tax case. They argue that since the warrant was overbroad, all the evidence seized under it should be suppressed. To the contrary, the remedy for an overbroad warrant is to sever the overbroad portions of the warrant from those portions that are sufficiently particular. *United States v. Blakeney*, 942 F.2d 1001, 1027 (6th Cir.), *cert. denied*, 502 U.S. 1008 (1991). The portions of the warrant limited to fruits and evidence of gambling are sufficiently particular; even though those portions do not contain a time limitation, their subject-matter limitation (fruits and evidence of gambling) fulfills the same function as a time limitation would have done, by limiting the warrant to evidence of the crimes described in the affidavit.[4/] The portions of the warrant limited to fruits and evidence of bingo can be severed from the part of the warrant which is not

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appellees waive arguments by failing to brief them. *See Thaddeus-X v. Blatter*, 175 F.3d 378, 403 at n.18 (6th Cir. 1999) (en banc).

[4/] The sentences under which the government justified seizure of the documents antedating gambling activities were the second and fourth clauses in the portion of the warrant describing property to be seized: "Books, records, receipts, bank statements and records, money drafts, letters of credit, money orders and cashier's checks, money wrappers, passbooks, bank checks, automatic teller machine receipts, Western Union receipts, safety deposit box keys, and other items evidencing the obtaining, secreting, transfer, and/or concealment of assets and the obtaining, secreting, transfer, concealment and/or expenditure of money" and "Indicia of occupancy, residency, and/or ownership of the premises described above, including but not limited to, utility and telephone bills, canceled envelopes, and keys". Additionally, the magistrate stated that three other clauses were "arguably" overbroad, but that no property had been seized pursuant to those clauses. *Supra*, n.3.

so limited. Therefore, seizure of the documents pertaining to the gambling and the closely related money laundering charges was permissible.

In another argument related to the overbreadth issue, Ford and Hutchins argue that the search was invalid because federal agents "tagged along" with Louisville Police Department officers executing a state warrant. Citing *United States v. Sanchez*, 509 F.2d 886 (6th Cir. 1975), Ford and Hutchins contend that the lack of a federal warrant invalidated the search. *Sanchez* does not prohibit federal officers from being present during execution of a state warrant, *see generally United States v. Searp*, 586 F.2d 1117 (6th Cir.1978), *cert. denied*, 440 U.S. 921 (1979), but only prevents officers from using a warrant describing one kind of evidence as a pretext for searching for evidence outside the warrant. In *Sanchez*, officers had a warrant to search for narcotics evidence, when they learned that there was also probable cause to search for explosives at the same house. Rather than obtain a warrant to search for explosives, they simply used the narcotics warrant to search for explosives. Since the explosives were outside the scope of the warrant, Sanchez moved to suppress the fruits of the warrantless search for the explosives. The government then claimed the explosives were in plain view during execution of the narcotics warrant and therefore could be seized even though they were outside the warrant. We rejected the plain view argument, holding that the explosives search was actually a "distinct intrusion" from the narcotics search. 509 F.2d at 889. We held that seizure of property unrelated to what was described in the warrant was exactly the harm that the Fourth Amendment's particularity clause was meant to prevent. *Id.* at 889-90. We therefore ordered the explosives suppressed. *Id.* at 890. We have just used similar reasoning to condemn the seizure of the Huber's, Inc. documents under a warrant based on an affidavit about illegal gambling. *Supra* at 575-78. However, in this case the

gambling and money laundering documents were covered by the valid portions of the warrant, which we have held are separable from the invalid portions. The government is making no attempt to excuse a warrantless seizure by a plain-view argument. The gambling documents were not seized under a warrant describing something else; they were seized by state officers under a state warrant describing gambling documents. *Sanchez* therefore provides no authority for suppressing them.

II.

Although we have already held that Ford's tax conviction must be reversed because evidence was admitted in violation of the exclusionary rule, we will address issues that are likely to arise in the event of retrial of the tax case. Ford argues that the district court erred in the tax case by refusing to give the reliance-on-advice-of-accountant instruction Ford proffered. The district court refused the instruction because there was no evidence that Ford relied on his accountant in deciding not to report the $330,969.93 in his 1988 return.

A court's refusal of a defendant's proffered instruction is reversible if the instruction is a correct statement of the law, not otherwise covered in the court's charge, and if the failure to give the instruction substantially impairs the defendant's defense. *United States v. Frost*, 125 F.3d 346, 372 (6th Cir. 1997), *cert. denied*, --- U.S. ----, 119 S.Ct. 40 (1998). A court should refuse a jury instruction if no evidence supports it, *United States v. Lindo*, 18 F.3d 353, 356 (6th Cir. 1994), but even weak evidence will suffice. *Frost*, 125 F.3d at 372. A defendant is entitled to a reliance-on-advice instruction if he shows (1) he made full disclosure of all pertinent facts and (2) he relied in good faith on the advice. *Lindo*, 18 F.3d at 356. Specifically, we have held that a reliance-on-advice-of accountant instruction is warranted even without per se

testimony that the defendant relied on the accountant's advice, so long as the circumstances support an inference that he did so rely. *United States v. Duncan*, 850 F.2d 1104, 1115-19 (6th Cir. 1988).

Ford argues that the accountant structured the transaction in which Ford sold the note to the accountant, and since Ford effected the transaction as the accountant planned, he necessarily relied on the accountant's advice. Actually, Ford was simply convicted for failing to report the $300,000, not for any other aspect of the transaction. The accountant testified that the plan as he formulated it was to delay Ford's receipt of the $300,000, but to report the $300,000 as income when received. Ford's failure to report the $300,000 was not part of the transaction planned by the accountant. The district court did not abuse its discretion in denying the reliance instruction.

III.

Ford argues that the district court in the tax case did not afford him his full rights to disclosure of jurors' tax audit information under the former 26 U.S.C. § 6103(h)(5) (1994).[5/] The district court ordered release of the venire list twelve days before trial so that Ford could request audit histories under the former section 6103(h)(5); Ford contends that this was not sufficiently in advance of trial to preserve his rights. To the contrary, the record shows that there was plenty of time for the IRS to supply the required information, which was made available four days after the release of the venire list and twelve days before jury selection. Under

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[5/] The former section 6103(h)(5) was repealed by The Taxpayer Relief Act of 1997, 111 Stat. 788, 1038. However, the Act states that the repeal is effective as to cases commenced after August 5, 1997, 111 Stat. 1038, whereas this case was begun in 1993.

United States v. Spine, 945 F.2d 143, 148 (6th Cir. 1991), a defendant was entitled to have the venire information disclosed in time to "permit the IRS to conduct a search of its records for potential jurors' tax histories." The time allowed in this case was sufficient for that purpose.

Ford also contends that the district court erred in limiting the IRS's disclosure obligation to the last six years' audit history. The district court supplemented the IRS information with a full voir dire on the subject of audit histories, and this satisfied Ford's rights under section 6103(h)(5). *See Spine*, 945 F.2d at 148.

IV.

A.

Ford contends that the district court erred in denying his motion for new trial in the gambling case on the ground that he was mentally incompetent to stand trial. Ford's first mention of the competence issue came after trial; his trial counsel filed an affidavit opining that he himself had provided ineffective assistance of counsel by failing to recognize Ford's incompetence and bring it to the court's attention during trial. The district court held a hearing in order to ascertain retrospectively whether Ford had been competent at trial. Ford and the United States produced medical experts who agreed that Ford had some brain damage from strokes and brain atrophy, but who expressed conflicting opinions about Ford's ability to understand the proceedings and assist in his own defense.

The district court articulated the proper legal standard governing the competence issue: the test is whether Ford had sufficient ability to consult with his lawyers and a reasonable degree of rational and factual understanding of the proceedings against him (quoting *Dusky v. United States*, 362

U.S. 402, 402 (1960) (per curiam)). The district court considered the testimony of the medical and other witnesses, tapes of Ford made during state court proceedings, and the court's own extensive observation of Ford during the proceedings in these related cases. The court found that Ford did suffer from the effects of strokes and brain atrophy. However, the judge recounted at length his own observations of Ford during the time in question and concluded that Ford was "extremely interested, knowledgeable, and informed about his case, about the proceedings, and about his desire to have his views and his positions known." The court observed that Ford's tendency to speak out in the courtroom and to assert control over his own defense may have been strategically inopportune, but that if Ford's decisions were "irrational," they showed only poor trial strategy, not incompetence. The judge found that Ford "did understand the nature and the consequences of these proceedings; and I think that he was able to assist properly in his defense to an extent that was greater and at a higher level than most defendants that I see." The court then denied Ford's motion for a new trial, stating, "From everything that I have in front of me, I will find that retrospectively during the trial, that Mr. Ford had a mental defect or defects but they were not such as to render him mentally incompetent to the extent of inability to understand the nature and consequences of the proceedings and to assist in his defense."

Ford argues that our cases conflict with each other about the proper standard of review of the competency determination. In *United States v. Branham*, 97 F.3d 835 (6th Cir. 1996), in which we reviewed a competency determination on direct appeal, we stated: "Because a district court's determination of competency is a factual finding we apply a clearly erroneous standard of review." *Id.* at 855; *accord United States v. Murphy*, 107 F.3d 1199, 1203 (6th Cir. 1997). On the other hand, in habeas cases we have

characterized the competency determination as a mixed question of law and fact, which is not entitled to the presumption of correctness given to state court findings of fact. *See Cremeans v. Chapleau*, 62 F.3d 167, 169 (6th Cir. 1995), *cert. denied*, 516 U.S. 1096 (1996); *Levine v. Torvik*, 986 F.2d 1506, 1514 (6th Cir.) (relying in part on *Card v. Singletary*, 963 F.2d 1440, 1443-44 (11th Cir.1992), which was vacated and amended in relevant part, 981 F.2d 481, 483-84 (11th Cir. 1992), *cert. denied*, 510 U.S. 839 (1993)), *cert. denied*, 509 U.S. (1993). These cases are apparently focusing on different aspects of the competency decision. To determine which standard of review is applicable in this case we must ascertain what aspect of the competency determination Ford attacks.

Ford has not shown that the district court applied the wrong legal standard in deciding the competency question. The district court made no legal error in concluding that Ford was competent notwithstanding evidence that his behavior in court was "cantankerous" or "difficult [for his lawyers] to deal with." *See Vogt v. United States*, 88 F.3d 587, 591 (8th Cir. 1996).

Other than this possible legal point, Ford's argument consists primarily of attacks on the testimony of Dr. Denney, the government's expert. The district court relied not only on Denney's testimony, but also on the court's extensive observation of Ford. Ford also argues that his own attorneys' testimony deserves to be credited, but those attorneys' failure to mention the possibility of incompetence until after trial undercuts the reliability of their more recent opinions that Ford was incompetent during trial. *See Owens v. Sowders*, 661 F.2d 584, 586 (6th Cir. 1981). The district court's choice between conflicting evidence is a factual finding and it is not clearly erroneous.

B.

In a related argument Hutchins contends that the district court erred in denying her motion for new trial based on newly discovered evidence of Ford's incompetence. She argues that Ford's incompetence affected her adversely by preventing her from testifying because: she knew if she testified, Ford would insist on testifying as well, and he lacked the mental capacity to testify without harming both of them before the jury; she was deprived of Ford's testimony that she acted only at his direction in running the gambling business; and she was deprived of a juror she wanted, because Ford tampered with that juror and caused him to be dismissed. Hutchins argues that the district court should have granted her a new trial on these grounds. The district court denied the new trial motion because it was premised on Ford's incompetence, and the court had just found Ford was competent.

We review the denial of Hutchins's motion for new trial based on newly discovered evidence for abuse of discretion. *See United States v. Seago*, 930 F.2d 482, 488 (6th Cir. 1991). We have already upheld the district court's finding that Ford was not incompetent. Moreover, Hutchins's claims about the effect of Ford's incompetence on her trial strategy were not "newly discovered" after trial, as she argued in her motion. *See id.* at 489. She obviously was aware of her trial strategy decisions during the trial. Finally, the district court conducted an adequate voir dire to assure that Hutchins suffered no prejudice from Ford's jury tampering. We therefore see no abuse of discretion in the district court's denial of Hutchins's motion.

V.

Ford argues that his convictions under 18 U.S.C. § 1955 are invalid because they are predicated on violation of a Kentucky law that conflicts with the Kentucky Constitution.

Section 1955 makes it a federal crime to conduct a gambling business that is illegal under state law (except that the federal statute exempts games of chance run by charitable organizations, 18 U.S.C. § 1955(e)). Bingo and similar "gift enterprises" are prohibited by the Kentucky Constitution, section 226:

> Except as provided in this section, lotteries and gift enterprises are forbidden, and no privileges shall be granted for such purposes, and none shall be exercised, and no schemes for similar purposes shall be allowed. The general assembly shall enforce this section by proper penalties. All lottery privileges or charters heretofore granted are revoked.

(The Kentucky Constitution was amended in November 1992, after the date of the offenses in this case, to permit charitable lotteries and gift enterprises.) Kentucky statutes provided criminal penalties for gambling, but provided a charitable gaming defense. Ky. Rev. Stat. Ann. §§ 528.010.10(b)-.120 (Michie 1985); 1990 Ky. Rev. Stat. & R. Serv. ch. 469 (Banks-Baldwin); 1992 Ky. Rev. Stat. & R. Serv. ch. 461 (Banks-Baldwin). The United States suggested in the district court that the charitable gaming defense in the statute conflicted with the Kentucky Constitution, which did not allow a charitable exception to the prohibition of gambling at the time of the events in question. The district court held that it would allow Ford and Hutchins to rely on the charitable gaming exception in the statute on due process and ex post facto grounds, even if the charitable gaming exception were unconstitutional (under the Kentucky Constitution).

Accordingly, the court instructed the jury that the United States had to prove that the bingo games were not charitable gaming activity, as defined by Kentucky law.

Despite receiving the benefit of the charitable gaming defense, Ford and Hutchins argued that the defense was unconstitutional and that it rendered the entire Kentucky gambling statute invalid. Without a violation of the Kentucky gambling statute, there would be no violation of 18 U.S.C. § 1955, which is predicated on a violation of state gambling law.

The district court held that, if the charitable gaming defense were unconstitutional, that would not invalidate the rest of the gambling statute. The court relied on Ky. Rev. Stat. § 446.090, which provides:

> It shall be considered that it is the intent of the General Assembly, in enacting any statute, that if any part of the statute be held unconstitutional the remaining parts shall remain in force, unless the statute provides otherwise, or unless the remaining parts are so essentially and inseparably connected with and dependent upon the unconstitutional part that it is apparent that the General Assembly would not have enacted the remaining parts without the unconstitutional part, or unless the remaining parts, standing alone, are incomplete and incapable or being executed in accordance with the intent of the General Assembly.

The court held that the charitable exception was separable from the rest of the statute and therefore did not affect the remaining part of the statute prohibiting gambling.

Ford and Hutchins can point to nothing in Ky. Rev. Stat. chapter 528 stating that the provisions of the chapter are inseparable. Ford and Hutchins argue that it is apparent that

the General Assembly would not have enacted the gambling prohibition without the charitable exception, but this argument is untenable. First, the Kentucky Constitution prohibited gambling without a charitable exception before the statute was enacted; it was therefore hardly unthinkable that the General Assembly would obey the command of the constitutional provision to enforce that provision by enacting proper penalties. Moreover, the provisions of chapter 528 making it illegal to promote gambling were enacted in 1974, 1974 Ky. Acts. ch. 406, whereas the charitable exception was not enacted until 1980. 1980 Ky. Rev. Stat. & R. Serv. ch. 267. Accordingly, we reject Ford and Hutchins's Kentucky constitutional argument and their suggestion that we certify the issue to the Kentucky Supreme Court.

VI.

Ford and Hutchins contend: (1) that the government failed to prove a transaction in interstate commerce to support their money laundering convictions; and (2) that the district court erroneously instructed the jury that it could infer a transaction affected interstate commerce if it involved a bank that was federally insured. The money laundering convictions were based on the deposit in or withdrawal of money from the Bank of Louisville; there was evidence that the Bank of Louisville was insured by the FDIC.

In a challenge to the sufficiency of the evidence, we must affirm if "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original). We review the jury instructions to ascertain if the charge as a whole fairly and adequately presents the issues and the law. *United States v. Newcomb*, 6 F.3d 1129, 1132 (6th Cir. 1993).

Ford and Hutchins were convicted under 18 U.S.C. § 1957 and Ford was also convicted of one count under 18 U.S.C. § 1956(a)(1)(B)(i). Section 1956(a)(1)(B) forbids knowingly conducting a "financial transaction" with the proceeds of specified unlawful activities knowing that the transaction is designed to conceal or disguise the nature, location, source, ownership, or control of such proceeds. "Financial transaction" is defined to include any transactions involving "the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree." Section 1956(c)(4)(B). Section 1957 forbids certain "monetary transactions" in criminally derived property. Under section 1957(f)(1) "monetary transaction" includes any "financial transaction under section 1956(c)(4)(B)" (except those transactions necessary to preserve a person's Sixth Amendment right to representation). Thus, both section 1956 and section 1957 contain interstate commerce elements, which can be satisfied by use of a bank whose activities affect interstate commerce.

Ford and Hutchins argue that proof of a transaction with a federally insured bank does not satisfy the government's burden of proving a transaction with a bank whose activities affected interstate commerce, citing *United States v. Lopez*, 514 U.S. 549 (1995). In *United States v. Owens*, 159 F.3d 221, 226 (6th Cir. 1998), *pet'n for cert. filed*, 67 U.S.L.W. 3749 (May 20, 1999) (No. 98-1912), we rejected a challenge to section 1956 under *Lopez*. We held that section 1956 regulated the instrumentalities of interstate commerce, and therefore was a permissible exercise of Congress's power to regulate interstate commerce. *Id.* We specifically remarked that "the use of federally insured banks and/or the transport of monies across state borders to facilitate the money laundering create a sufficient nexus to commerce to allow application of § 1956." We have recently reiterated that *Lopez* did not raise the standard for proving the interstate

commerce nexus in section 1956 and 1957 prosecutions. *United States v. Ables*, 167 F.3d 1021, 1030 (6th Cir.), *cert. denied*, --- U.S. ----, 1999 WL 319434 (June 21, 1999).

We therefore hold that the proof of the interstate commerce element and the jury instruction on that subject were adequate.

VII.

Ford and Hutchins were sentenced using the base offense level prescribed by U.S.S.G. § 2S1.2(a) (Nov.1996), the guideline for "Engaging in Monetary Transactions in Property Derived from Specified Unlawful Activity," which applies to convictions under 18 U.S.C. § 1957. They claim that the district court erred in declining to depart downward from the guidelines sentencing ranges because transactions in gambling proceeds are atypical of section 1957 offenses and because state law required Ford to deposit the gambling proceeds in the bank. The government's sole response is that the district court's decision not to depart is unreviewable.

At sentencing, Ford and Hutchins argued that their offenses fell outside the heartland of section 2S1.2. The district court concluded that their offenses were not outside the heartland; accordingly, the court reasoned that it was not authorized under 18 U.S.C. § 3553(b) to depart. The court stated:

> [I]f this conduct is outside the heartland, I would consider a downward departure. So that my holding is that because I believe that it is not outside the heartland that I am not able to depart. That will give you the opportunity of raising my failure to depart downward with the Court of Appeals. Otherwise, I think if the court fails to depart, it's pretty tough to get appellate review.

The court articulated three bases for its decision that the offenses were within the heartland of section 2S1.2. First, it rejected Ford's suggestion that the guideline should only apply to transactions connected with drugs or organized crime. The court observed that gambling is included as a kind of activity that generates proceeds subject to section 1957.[6/] The court stated:

> The Court believes that the best evidence of legislative intent is the plain language of the statute in the first instance.... [H]ere in 1956, the term, specified unlawful activity, is defined as: "Any act or activity constituting an offense listed in Section 1961(1) of that title."
>
> Now 1961(1), of course, mentioned gambling. Section 1957 references 1956. So I think that the coverage here of gambling in a general sense militates against the Court concluding that in a generic sense gambling activity is outside the heartland of the money-laundering statutes.

Second, after concluding that transactions in gambling proceeds were not per se outside the heartland, the court considered whether the particular transactions in this case were outside it. The court held that the magnitude of Ford's aggregated transactions put Ford squarely within the heartland: "I think that here we have significant amounts of cash, large amounts of cash, well over a million dollars worth of money-laundering activity. We have a, what must be described as a fairly large scale operation by Mr. Ford. This was not a backyard dice game." In sentencing Hutchins, the

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[6/] Section 1957 applies to transactions in proceeds from "specified unlawful activity" as defined in section 1956, which in turn incorporates by reference the lists of offenses found in 18 U.S.C. § 1961(1). That list includes operation of an illegal gambling business under section 1955.

court pointed to the much smaller magnitude of Hutchins's convictions:

> We are talking about $94,000 here. . . . The fact that there is a smaller amount of money involved is a point to be made. On the other hand, I think looking at the matter as a whole, I am of the opinion that there is not a showing that this conduct is outside the heartland of the money laundering statutes.

Third, the court rejected as a factual matter Ford's explanation of his conduct--that he was required by state law to deposit the charitable gambling proceeds in the bank:

> The argument that there was a lot of money laundering as opposed to a little because Mr. Ford had to deposit money into a bank in order to comply with state law is interesting. I'm not sure that in the context of this entire matter, I can view Mr. Ford's conduct as paying a tremendous amount of attention to obeying the law. In fact, he clearly didn't, at least with respect to the charges in this case.

Although the court made this statement referring to Ford individually, Hutchins's counsel's downward departure argument for the most part simply incorporated Ford's earlier argument by reference, and did not reiterate the compelled-by-state law argument explicitly. The court did not make separate findings on this argument in Hutchins's case, but simply declined to depart "looking at the matter as a whole."

Ordinarily, a district court's decision not to depart is not reviewable. *United States v. Hill*, 167 F.3d 1055, 1071 (6th Cir. 1999). However, if the district court's refusal to depart stemmed from its legal conclusion that the circumstance urged by the defendant was not a valid reason for departure, the

decision is reviewable. *United States v. Ebolum*, 72 F.3d 35, 37 (6th Cir. 1995); *United States v. Hamilton*, 949 F.2d 190, 193 (6th Cir. 1991). See also *United States v. Watkins*, No. 97-6232, 1999 WL 374114 at *10 (6th Cir, June 10, 1999). The district court's legal determination that it lacked authority to depart on the basis of a certain factor is reviewed de novo. *Ebolum*, 72 F.3d at 37. *See United States v. Koon*, 518 U.S. 81, 100 (1996) (whether particular factor is ever a permissible basis for departure is "a question of law").

In determining whether the district court's refusal to depart downward was an exercise of discretion or a legal determination, we must review the sentencing transcript. *Id.* If the record gives us no reason to doubt that the district court properly apprehended its discretion to depart, we will assume it understood that discretion. *Hill*, 167 F.3d at 1071.

Here, the district court's conclusion that transactions in gambling proceeds are not *per se* outside the heartland is a question of law reviewable on appeal. However, the court's determination that Ford was not simply trying to comply with state law when he engaged in the transactions at issue is a refusal to depart based on the exercise of discretion, not reviewable on appeal. Although the court did not make separate findings as to Hutchins on the compelled-by-state-law argument, the record gives us no reason to think the court misunderstood its discretion to depart on the issue. The court's determination that the magnitude of Ford's and Hutchins's transactions did not warrant departure was apparently an exercise of discretion since the court did not reject the relevance of magnitude to departure, but merely determined that the magnitude in this particular case did not take the offenses out of the heartland of section 2S1.2.[2/]

[2/] The question of magnitude could have been a legal issue if the district court had made its decision on the basis that the threshold amount of

Therefore, the court's rejection of magnitude as a basis for departure in this case is not reviewable.

Ford and Hutchins contend that their cases are outside the heartland of section 2S1.2 because the money did not come from "serious underlying criminal conduct such as a significant drug trafficking operation or organized crime." They further argue that their case is outside the heartland because they did not undertake the financial transactions to "make it appear that the funds were legitimate" or "to promote additional criminal conduct by reinvesting the proceeds in additional criminal conduct." The government does not brief the merits of the sentencing issues, but confines its discussion of the sentencing issues to its argument that the district court's refusal to depart is not reviewable on appeal.

Under 18 U.S.C. § 3553(b) (1994), a court must sentence within the guidelines range unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission.

The policy statement at Ch.1, Pt. A 4(b) refers to these unforeseen circumstances as taking the offense out of the "heartland" of the guideline:

$10,000 is listed in section 1957 and the background commentary to section 2S1.2, and that the Sentencing Guidelines had therefore already taken magnitude into account. Cf. *United States v. Bifield*, 42 F.Supp. 2d 477, 485 n.4 (M.D.Pa.1999) (money laundering guidelines take into account monetary amount). The district court did not take this tack.

> The Commission intends the sentencing courts to treat each guideline as carving out a "heartland," a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted. Section 5H1.10 (Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status), § 5H1.12 (Lack of guidance as a Youth and Similar Circumstances), the third sentence of § 5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse), and the last sentence of § 5K2.12 (Coercion and Duress) list several factors that the court cannot take into account as grounds for departure. With those specific exceptions, however, the Commission does not intend to limit the kinds of factors, whether or not mentioned anywhere else in the guidelines, that could constitute grounds for departure in an unusual case.

If a factor is already taken into account in the guidelines, the court "should depart only if the factor is present to an exceptional degree or in some other way makes the case different from the ordinary case where the factor is present." *Koon*, 518 U.S. at 96. *Accord*, U.S.S.G. § 5K2.0 (Policy Statement) ("[T]he court may depart from the guidelines, even though the reason for departure is taken into consideration in determining the guideline range (*e.g.*, as a specific offense characteristic or other adjustment), if the court determines that, in light of unusual circumstances, the weight attached to that factor under the guidelines is inadequate or excessive.")

Ford and Hutchins argue that a departure was warranted because there was no showing of intent to conceal the origin of the funds or that the funds were used to promote further illegal activity. The background note to section 2S1.2

specifically states that section 1957 "does not require that the recipient . . . have any intent to further or conceal [the specified unlawful activity]." Lack of intent to conceal or promote the unlawful activity has already been considered in the guideline and commentary, and Ford and Hutchins have not shown any unusual circumstances rendering the guidelines' consideration inadequate in their case.

They also contend that the thrust of the "money-laundering" guidelines is to punish money laundering resulting from "serious underlying criminal conduct such as drug trafficking and organized crime." If they mean to suggest that transactions in gambling proceeds are not qualitatively the sort of conduct meant to be punished, the guidelines must also be said to address this question; the application note to section 2S1.2 references section 1961(1), which includes operation of a gambling business. Though the application of section 1957 to transactions stemming from offenses unrelated to drug trafficking and organized crime is clearly not unforeseen, either by Congress or the Sentencing Commission, some courts justifying a departure have noted the absence of these prototypes. For instance, in *United States v. Woods*, 159 F.3d 1132, 1134-35 (8th Cir. 1998); *United States v. Hemmingson*, 157 F.3d 347, 361-63 (5th Cir. 1998); and *United States v. Caba*, 104 F.3d 354 (table), No. 96-1069(L), 1996 WL 685764 at *3 (2d Cir. 1996) (unpublished), Courts of Appeals affirmed departures based in part on the fact that the underlying offenses, though literally within the statute, were not drug- trafficking, "organized crime," "serious money-laundering," or "unusually severe fraud." On the other hand, in *United States v. Adams*, 74 F.3d 1093,1102 (11th Cir. 1996), the Eleventh Circuit reversed a district court that departed on the ground that the case before it did not involve "classic money laundering." Similarly, in *United States v. LeBlanc*, 24 F.3d 340, 346-47 (1st Cir.), *cert. denied*, 513 U.S. 896 (1994), the

First Circuit held it was error not to sentence deposit of gambling proceeds under the money laundering guidelines, since section 1956 covers a far broader array of crimes than "classic money laundering" involving drug proceeds. See also *United States v. Conley*, 37 F.3d 970, 981 (3d Cir. 1994) (legislative history of Money Laundering Control Act of 1986 indicates illegal gambling was an area of concern).

The Sentencing Commission itself has attempted to modify the guidelines to narrow the money-laundering provisions, which, the Commission discovered, were so wide-ranging that severe money-laundering sentences were "being imposed for a much broader scope of offense conduct, including some conduct that is substantially less serious than the conduct contemplated when the . . . guidelines were first formulated." United States Sentencing Comm'n, *Report to the Congress: Sentencing Policy for Money Laundering Offenses, including Comments on Department of Justice Report*, 5 (Sept. 18, 1997). In 1995, the Commission proposed a comprehensive revision of the money-laundering guidelines in an attempt to make the punishment fit the crime. *Id.* at 2. Specifically, the Commission sought to "recalibrate the penalties to the seriousness of the underlying offense." *Id.* at 10.

> The Commission's proposed guideline changes, unlike the current guidelines, were also designed to avoid arbitrarily determined, heightened penalty levels in those situations where a financial transaction may technically violate the money laundering statutes but not present additional societal harm sufficient to merit substantially more severe sanctions than those appropriate for the underlying offense from which the illicit funds were generated.

Id. at 11. However, Congress disapproved the revision, and section 2S1.2 remains in place substantially unaltered. *Id.* at

2. In determining whether a circumstance was adequately taken into consideration by the Sentencing Commission, 18 U.S.C. § 3553(b) limits our consideration to the guidelines themselves, the official commentary and the policy statements; we therefore may not base our decision on the Commission's proposed amendment. *See United States v. Morelli*, 169 F.3d 798, 809 n.13 (3d Cir. 1999) ("[P]roposed amendments to the Sentencing Guidelines do not provide independent legal authority for a downward departure."), *pet'n. for cert. filed*, 67 U.S.L.W. 3758, (June 7, 1999) (No. 98-1969).

We conclude that the inclusion of gambling offenses within the money laundering statutes as "specified unlawful activities" shows conclusively that an offense is not outside the heartland *merely* because it involves gambling proceeds rather than drug or organized crime proceeds. There may, of course, be articulable reasons why a particular gambling case does not threaten the kind of harm Congress aimed at preventing, but Ford and Hutchins have not shown any. Without some showing of particular factors "of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines," *United States v. Reed*, 167 F.3d 984, 995 (6th Cir. 1999) (quoting section 3553(b)), the district court should not depart.

VIII.

Hutchins argues that the district court erred in denying her motion for severance and mistrial after there was an allegation that Ford had contacted a juror during trial. The district court removed the juror whom Ford had allegedly contacted. The court examined the remaining jurors individually and assured itself that they had not been affected by the impropriety. The court denied Hutchins's severance and mistrial motion.

The jury acquitted Hutchins on Count I, but convicted Ford on that count.

We review the district court's ruling on severance and mistrial motions for abuse of discretion. *United States v. Lloyd*, 10 F.3d 1197, 1215 (6th Cir.1993) (severance), *cert. denied*, 511 U.S. 1043 (1994); *United States v. Chambers*, 944 F.2d 1253, 1263 (6th Cir.1991) (mistrial), *cert. denied*, 502 U.S. 1112 (1992). The record shows the district court conscientiously investigated the effect of Ford's impropriety on the remaining jurors and reasonably concluded that they were not tainted. The court's conclusion that the jurors could consider Hutchins's guilt separately from Ford's was borne out by the jury's acquittal of Hutchins and conviction of Ford on Count I. There was no abuse of discretion.

IX.

Hutchins was convicted of two counts of aiding and abetting transactions with criminal proceeds, 18 U.S.C. § 1957, for her deposit of two checks drawn on the RVA Ladies' Auxiliary account, in the amounts of $75,000 and $19,000, into the RVA Post No.1 Bank of Louisville account. Both checks were signed by Hutchins and Ford and both checks were imprinted: "Checks over $2,000.00 require two signatures." Hutchins contends that for checks over $2,000, Ford's signature was required, but that hers was not. She cites a bank signature card for the Ladies' Auxiliary with these instructions: "Don Ford may sign any checks- Checks over $2000.00 signed by Sandy Hutchins requires signature of Don Ford too." Hutchins argues that her signature was gratuitous and therefore of no legal effect.

Leaving to one side the legal impossibility conundrum Hutchins poses, her argument fails on the facts. Regardless of what the bank signature card said, the check itself was printed with the instruction that two signatures were needed for checks over $2,000. Hutchins's signature would have

avoided the obvious difficulty of negotiating a check in contravention of instructions printed on the face of that check. Her part in negotiating the check satisfies the actus reus requirement of 18 U.S.C. § 1957 and 18 U.S.C. § 2 of aiding and abetting a monetary transaction with criminally derived funds.

. . .

In sum, we reverse Ford's tax conviction, but affirm Ford's and Hutchins's gambling and money laundering convictions. We reject their challenges to the district court's refusal to depart downward. However, because Ford's tax conviction evidently affected the criminal history category used in his sentencing on the gambling and money laundering convictions, we remand for resentencing.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 97-6097, 97-6270, 97-6271

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

DONALD G. FORD (97-6097/6270); SANDRA HUTCHINS FORD (97-6271), *Defendants-Appellants.*

JUDGMENT

On Appeal from the United States District Court
for the Western District of Kentucky at Louisville.

Before: NELSON, CLAY, and GIBSON,[*] Circuit Judges.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that defendant Donald Ford's tax conviction is REVERSED, defendants Donald Ford and Sandra Hutchins's gambling and money laudering convictions are AFFIRMED. IT IS

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[*] The Honorable John R. Gibson, Circuit Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

FURTHER ORDERED that the sentence of defendant Ford is REMANDED for resentencing.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 97-6097, 97-6270, 97-6271

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

DONALD G. FORD (97-6270); SANDRA HUTCHINS FORD (97-6271), *Defendants-Appellants.*

Appeal from the United States District Court
for the Western District of Kentucky at Louisville.
Nos. 93-00081; 93-0082—Charles R. Simpson, III, Chief District Judge.

ORDER

[Filed October 8, 1999]

Before: NELSON, CLAY, and GIBSON,[*] Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court,

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[*] The Honorable John R. Gibson, Circuit Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

No. 3:93-CR-0082-S

UNITED STATES OF AMERICA, *Plaintiff*,

v.

DONALD G. FORD AND SANDRA HUTCHINS FORD,
Defendants.

TRANSCRIPT OF PROCEEDINGS

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* * * * *

BEFORE HONORABLE CHARLES R. SIMPSON III, CHIEF JUDGE, UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF KENTUCKY, AT LOUISVILLE, KENTUCKY, BEGINNING ON OCTOBER 4, 1996.

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NOVEMBER 15, 1996

* * * * *

Now with respect to Counts 34 and 35, Mr. Ford has moved for judgment of acquittal as to those counts on the basis that there has been no showing of interstate commerce. The government's evidence did prove through Witness Frazier at Volume IX on Page 49 that the Bank of Louisville was an F.D.I.C.-insured institution, and the Fourth Circuit has decided a case of *United States v. Peay*, at 972 F.2d 71, for the proposition that proof that an institution is F.D.I.C. insured justifies the inference that there is an effect on interstate commerce.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Nos. 97-6097, 97-6270, 97-6271

UNITED STATES OF AMERICA, *Plaintiff*,

v.

DONALD G. FORD AND SANDRA HUTCHINS FORD,
Defendants.

TRANSCRIPT OF SENTENCING

* * * * *

BEFORE HONORABLE CHARLES R. SIMPSON III, UNITED STATES DISTRICT JUDGE, WESTERN DISTRICT OF KENTUCKY AT LOUISVILLE, KENTUCKY, ON OCTOBER 8, 1997 AND OCTOBER 9, 1997.

* * * * *

VOLUME II
OCTOBER 9, 1997

[Tr. 45] * * * THE COURT: All right. Well, I think it's clear that the analysis here is fact specific and case specific; and I think certainly it was in the *Koon* case and would appear to be in all these cases rather fact-specific.

The Court believes that the best evidence of legislative intent is the plain language of the statute in the first instance. Sometimes the language in the statute is not plain, and sometimes it is confusing and written in a circular or weird way that all lawyers have come to in their practices deal with from time to time. But where the language is specific, I think that it must be assumed that the legislature intended what it wrote and what it enacted; and certainly here in 1956, the term, specified unlawful activity, is defined as:

"Any act or activity constituting an offense listed in Section 1961(1) of that title."

Now 1961(1), of course, mentioned gambling. 19 - Section 1957 references 1956. So I think that the coverage here of gambling in a general sense militates against the Court concluding that in a generic sense [Tr. 46]* * * gambling activity is outside the heartland of the money-laundering statutes.

I am aware of the context in which the statute was enacted and also the quotations from the legislators and the very excellent thought processes that have gone into the various opinions that the courts have created on these issues.

Under these circumstances here and cognizant of what is written into the statute as constituting specified unlawful activity, I am going to decline to depart downward on the heartland argument.

I think that here we have significant amounts of cash, large amounts of cash, well over a million dollars worth of money-laundering activity. We have a, what must be described as a fairly large scale operation by Mr. Ford. This was a back yard dice game. This was a large scale operation generating large amounts of money.

I believe that it is true that Mr. Ford could have taken this money and put it in the mattress, but obviously many people generating large amounts of illegal cash do not wish to do that because then they become susceptible to being separated from

their money by other criminals as well as by catastrophic events like fires, whatever.

So people who generate large amounts of cash [Tr. 47] * * * through illegal operations many times feel the necessity of laundering it, to cleanse it, to be able to use it, and not always in furtherance of their business. There is - think Mr. Mazzoli pointed out not a 100 percent dividend reinvestment plan that many criminals follow. They like to use money for their own purposes as well as to perhaps finance their businesses, and that seems to be what we have in this case.

This is not a drug case. It is not an organized crime case, but it does bear some of the badges of the organized crime case because it is illegal activity. It is an illegal activity that generated a large amount of cash. I think in one of these opinions, one of the judges said that people drown in cash. Now it may have been in the context of the drug dealer rather than something along this line, but we have here an extraordinarily large amount of cash and coins that we heard about generated from this business; and Mr. Ford, taking these monies and doing things with it to - in conduct which constituted money laundering.

In fact, it was generated in gambling rather than organized crime for drugs. I think, as I said, it's not particularly motivated here because of the fact that gambling is referenced as a specified unlawful activity.

And under the particular facts here, I think [Tr. 48]* * * we have a large enterprise. We have a large amount of cash. We have illegal activity, and we have laundering the money in really the classic sense. This was classic money laundering. There's no question about it.

The argument that there was a lot of money laundering as opposed to a little because Mr. Ford had to deposit money into a bank in order to comply with state law is interesting. I'm not sure that in the context of this entire matter, I can

view Mr. Ford's conduct as paying a tremendous amount of attention to obeying the law. In fact, he clearly didn't, at least with respect to the charges in this case.

But he did set up a number of so-called charitable Veterans organizations, obviously for his own reasons of business rather than to have lots of charities. He set them up in order to ease and make easier the conduct of his operation. And the fact that that may have then generated additional money-laundering charges I don't think militates in and of itself against considering this inside the heartland of the money-laundering statutes.

In some of the cases that I read, there were relatively small amounts of money. There was conduct that was rather peculiar. I'm thinking, for instance, of the Louisiana case involving Espy and - the lawyer, and things like that that really perhaps could not be described as [Tr. 49] * * * classic money laundering but involved literal compliance or, shall we say, literal identity with the words in the statute but could not - did not have the flavor and the classic attributes of money laundering. This case does.

And so I am going to decline to depart on that, but I will give you this. I will make the finding that this case is within the heartland and not outside the heartland of the money-laundering statutes and indicate that I would consider the matter further were it outside. So you have at least the ability to raise this with the Court of Appeals and to allow them to consider otherwise failures of the trial Court to depart or have a difficult time being reviewed on appeal. So by making that finding, I'll certainly give you the opening to raise it with the Sixth Circuit and see if the Sixth Circuit will agree with your view under the facts of this case, this particular comment by Mr. Ford outside what you believe is the heartland of these statutes.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Nos. 97-6097, 97-6270, 97-6271

UNITED STATES OF AMERICA, *Plaintiff*,

v.

DONALD G. FORD AND SANDRA HUTCHINS FORD,
Defendants.

TRANSCRIPT OF SENTENCING

VOLUME II-B
SENTENCING
October 9, 1997
LOUISVILLE, KENTUCKY
BEFORE HONORABLE CHARLES R. SIMPSON, III

APPEARANCES:

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[Defendants present.]

* * * * *

[Tr. 30] * * * THE COURT: Was there something else you wanted to bring up before I impose sentence in this case?

MR. CLINE: No, Your Honor. When you do impose a sentence of imprisonment, which I understand you have to do here, I would ask that you recommend FCI Lexington. I would also like to make the point -- I understand this is not a finding for the court to make, but I simply want to state on the record that Mr. Ford has been confined on this case since I believe November 22nd of '96 at the time of the jury verdict. When you finish -- sorry to keep anticipating, but when you do finish, we do have a motion to stay the fine and forfeiture, but that is probably premature at this point.

THE COURT: I'll ask your client to join you there.

All right. At this time I would intend to propose -- impose sentence in this case, if there is no other argument to be made, which apparently there is not.

Then pursuant to the Sentencing Reform Act of 1984, it is the judgment of the court that the defendant, Donald G. Ford, is committed to the custody of the Bureau of Prisons for a term of 60 months as to each of Counts 1 and 2 and for [Tr. 31]* * * a term of 108 months as to each of Counts 4, 7 through 31 and 34. Those terms would be served concurrently, each with the other, for a total term of imprisonment of 108 months. This sentence will be served concurrently to the 20-month term of imprisonment imposed in Criminal Action Number 3:93-CR-81.

It is further ordered that the defendant will pay fines. The fine imposed in this case will be a fine of $500,000 as to Count 34 in the indictment, plus $192,168 as an additional fine for the costs of incarceration computed at the amount of $21,352 per year, plus $7,030.80 for the costs of supervision computed at the rate of $2,343.60 per year for three years.

Now, there is some overlap here with the other case. The costs of supervision are ordered concurrently with the costs of supervision imposed in Criminal Action 3:93-CR-81, for a total of $7,030.80. An additional fine is imposed in the following sums, since I don't have an adding machine on the bench, $372, $4,400.14, $266.18, $228.18, and $1,000 as the costs of prosecution pursuant to 28 U.S.C. Section 1918(b).

It is further ordered that the defendant pay special penalty assessments in the amount of $50 as to each of Counts 1, 2, 4, 7 through 31, and 34 in the indictment, for a total of $1,450.

[Tr. 32] * * * The fines and the special penalty assessments are due to be paid to the U.S. District Court Clerk on this date.

Pursuant to the jury verdict, the items listed in Counts 4 and 7 through 34 of the indictment are ordered forfeited.

Restitution is not necessary to be addressed in this case.

Upon release from imprisonment, the defendant is placed on supervised release for a term of three years as to each of Counts 1, 2, 4, 7 through 31, and 34 in the indictment. Those terms will be concurrent for a total term of supervised release of three years.

While on supervised release, the defendant will abide by the conditions of supervised release which will be explained to him by the probation officer and filed in the record in this case.

As justification, the offense level in this case is 30, the criminal history category is II. The guideline range for imprisonment is 108 to 135 months, and the guideline range for supervised release is two to three years, and the guideline fine range is $15,000 to $500,000.

The sentence of 108 months custody, total fines as indicated, and the three-year term of supervised release are within the appropriate guideline ranges and are sufficient to [Tr. 33] * * * meet sentencing objectives and punishment, incapacitation and general deterrence.

The court has selected a sentence at the low end of the guideline range in view of all the factors that have been brought to the court's attention in this matter, and the court feels that that is the just sentence within that range.

The fines that have been imposed here, Mr. Ford has refused to provide consistently financial information to the court through the Probation Office and has refused to disclose to the court his financial picture, but all the information available to the court, including information contained in the presentence report and other information, convinces the court that the defendant is and remains a wealthy individual who can afford to pay the fine imposed in this case -- the fines imposed in this case, and therefore, the court will impose the fines as stated and justify as stated.

I will order the presentence report in this case sealed and available to counsel on appeal, and I will order that the sentencing recommendation of the Probation Office be sealed and not available to counsel on appeal.

* * * * *

[Tr. 49] * * * THE COURT: I'm going to overrule your objection. [Tr. 50] * * * I have commented already on the general heartland situation and the notion that gambling is a specified unlawful activity specifically referenced in the money laundering statutes, both of them, and that this was a large operation and there was a significant amount of money laundered by Mr. Ford.

Now, this was a large operation, and I found that the specific actions of Mr. Ford, and I believe in this case Mrs. Ford with respect to this matter, look like classic money laundering of the proceeds of an illegal operation.

There is some difference between this case and Mr. Ford's. Number one, I suppose the fact that it was a large operation is interesting, but Mrs. Ford has only been convicted on two counts, which together constitute, in comparison to the money laundering charges and convictions

of Mr. Ford, a relatively small sum of money. We are talking about $94,000 here.

There have been some cases that I have looked at in which the amounts were fairly small, and the courts in those cases found that it was outside the heartland. I was thinking of the $20,000 matter in Louisiana involving, as I mentioned earlier, the Espy case, involving I think former Agriculture Secretary Espy's brother.

The fact that there is a smaller amount of money involved is a point to be made. On the other hand, I think [Tr. 51] * * * looking at the matter as a whole, I am of the opinion that there is not a showing that this conduct is outside the heartland of the money laundering statutes.

Now, I will rule as I did in Mr. Ford's case, that is, I will indicate that if this matter -- if this conduct is outside the heartland, I would consider a downward departure. So that my holding is that because I believe that it is not outside the heartland that I am not able to depart. That will give you the opportunity of raising my failure to depart downward with the Court of Appeals. Otherwise, I think if the court fails to depart, it's pretty tough to get appellate review.

MR. PARTIN: Yes, sir.

THE COURT: So if the court should hold that it is within -- outside the heartland, then there is at least an issue there that would come back, and therefore, I think the Court of Appeals would review it.

Even though there is a much smaller amount of money involved here, I looked at the context of the whole matter, I believe that this conduct -- I indicated earlier in Mr. Ford's case that it was clear that there was a fact specific inquiry on heartland issues, but as with Mr. Ford, this appears to have

the flavor of what I consider to be in the heartland of money laundering, transferring of ill-gotten gains in such a way that it can be translated into profits [Tr. 52] * * *through the laundering of the money. I think that's what occurred here.

So for that reason, I will deny your objection, Mr. Partin.

* * * * *

[Tr. 62] * * * THE COURT: All right. Then the court will impose judgment in this matter.

Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the court that the defendant, Sandra Hutchins Ford, is committed to the custody of the Bureau of Prisons for a term of 41 months as to Counts 2, 32 and 33 in the second superseding indictment. Those terms will be served concurrently, each with the other, for a total term of imprisonment of 41 months.

It is further ordered that the defendant pay special penalty assessments in the amount of $50 as to each of Counts 2, 32 and 33. The special penalty assessment is due to be paid to the U.S. District Court Clerk on this date.

We need not address restitution.

Upon release from imprisonment, the defendant is placed on supervised release for a term of three years as to each of Counts 2, 32 and 33. Those terms will be served concurrently for a total term of supervised release of three years. While on supervised release, the defendant will abide by the conditions of supervised release which will be explained by the probation officer and filed in the record.

[Tr. 63] * * * The costs of incarceration and supervised release are waived.

In this case I cannot see why we would have mandatory drug testing.

PROBATION OFFICER: Your Honor, this predates the mandatory drug testing.

THE COURT: So there's not mandatory drug testing.

PROBATION OFFICER: It's not required.

THE COURT: As justification, the offense level in this case is 22, the criminal history category is I. The guideline range for confinement is 41 to 51 months, and the fine range is $7500 to $75,000, and the guideline range for supervised release is two to three years.

As Mr. Partin pointed out, the defendant has been forthcoming with respect to financial matters, and the court has found that defendant does not have the ability -- apparent present ability to pay a fine with the asset that she has listed as her only significant asset. Therefore, the court has waived the fine and will waive the costs of incarceration and supervised release as well.

The sentence of 41 months custody and three years of supervised release are within the appropriate guideline ranges, and I believe are sufficient to meet the sentencing objectives of punishment, incapacitation and general deterrence.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 1956. Laundering of monetary instruments

(a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity—

(A)(i) with the intent to promote the carrying on of specified unlawful activity; or

(ii) with intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986; or

(B) knowing that the transaction is designed in whole or in part—

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

(ii) to avoid a transaction reporting requirement under State or Federal law,

shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both.

(2) Whoever transports, transmits, or transfers, or attempts to transport, transmit, or transfer a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States—

(A) with the intent to promote the carrying on of specified unlawful activity; or

(B) knowing that the monetary instrument or funds involved in the transportation, transmission, or transfer represent the proceeds of some form of unlawful activity and knowing that such transportation, transmission, or transfer is designed in whole or in part—

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

(ii) to avoid a transaction reporting requirement under State or Federal law,

shall be sentenced to a fine of not more than $500,000 or twice the value of the monetary instrument or funds involved in the transportation, transmission, or transfer whichever is greater, or imprisonment for not more than twenty years, or both. For the purpose of the offense described in subparagraph (B), the defendant's knowledge may be established by proof that a law enforcement officer represented the matter specified in subparagraph (B) as true, and the defendant's subsequent statements or actions indicate that the defendant believed such representations to be true.

(3) Whoever, with the intent—

(A) to promote the carrying on of specified unlawful activity;

(B) to conceal or disguise the nature, location, source, ownership, or control of property believed to be the proceeds of specified unlawful activity; or

(C) to avoid a transaction reporting requirement under State or Federal law,

conducts or attempts to conduct a financial transaction involving property represented to be the proceeds of specified unlawful activity, or property used to conduct or facilitate specified unlawful activity, shall be fined under this title or imprisoned for not more than 20 years, or both. For purposes of this paragraph and paragraph (2), the term "represented" means any representation made by a law enforcement officer or by another person at the direction of, or with the approval of, a Federal official authorized to investigate or prosecute violations of this section.

(b) Whoever conducts or attempts to conduct a transaction described in subsection (a)(1) or (a)(3), or a transportation, transmission, or transfer described in subsection (a)(2), is liable to the United States for a civil penalty of not more than the greater of—

(1) the value of the property, funds, or monetary instruments involved in the transaction; or

(2) $10,000.

(c) As used in this section—

(1) the term "knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity" means that the person knew the property involved in the transaction represented proceeds from some form, though not necessarily which form, of activity that constitutes a felony under State, Federal, or foreign law, regardless of whether or not such activity is specified in paragraph (7);

(2) the term "conducts" includes initiating, concluding, or participating in initiating, or concluding a transaction;

(3) the term "transaction" includes a purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition, and with

respect to a financial institution includes a deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit, purchase or sale of any stock, bond, certificate of deposit, or other monetary instrument, use of a safe deposit box, or any other payment, transfer, or delivery by, through, or to a financial institution, by whatever means effected;

(4) the term "financial transaction" means (A) a transaction which in any way or degree affects interstate or foreign commerce (i) involving the movement of funds by wire or other means or (ii) involving one or more monetary instruments, or (iii) involving the transfer of title to any real property, vehicle, vessel, or aircraft, or (B) a transaction involving the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree;

(5) the term "monetary instruments" means (i) coin or currency of the United States or of any other country, travelers' checks, personal checks, bank checks, and money orders, or (ii) investment securities or negotiable instruments, in bearer form or otherwise in such form that title thereto passes upon delivery;

(6) the term "financial institution" has the definition given that term in section 5312(a)(2) of title 31, United States Code, or the regulations promulgated thereunder;

(7) the term "specified unlawful activity" means—

(A) any act or activity constituting an offense listed in section 1961(1) of this title except an act which is indictable under subchapter II of chapter 53 of title 31;

(B) with respect to a financial transaction occurring in whole or in part in the United States, an offense against a foreign nation involving—

(i) the manufacture, importation, sale, or distribution of a controlled substance (as such term is defined for the purposes of the Controlled Substances Act);

(ii) murder, kidnapping, robbery, extortion, or destruction of property by means of explosive or fire;

(iii) fraud, or any scheme or attempt to defraud, by or against a foreign bank (as defined in paragraph 7 of section 1(b) of the International Banking Act of 1978;

(C) any act or acts constituting a continuing criminal enterprise, as that term is defined in section 408 of the Controlled Substances Act (21 U.S.C. 848);

(D) an offense under section 32 (relating to the destruction of aircraft), section 37 (relating to violence at international airports), section 115 (relating to influencing, impeding, or retaliating against a Federal official by threatening or injuring a family member), section 152 (relating to concealment of assets; false oaths and claims; bribery), section 215 (relating to commissions or gifts for procuring loans), section 351 (relating to congressional or Cabinet officer assassination), any of sections 500 through 503 (relating to certain counterfeiting offenses), section 513 (relating to securities of States and private entities), section 542 (relating to entry of goods by means of false statements), section 545 (relating to smuggling goods into the United States), section 549 (relating to removing goods from Customs custody), section 641 (relating to public money, property, or records), section 656 (relating to theft, embezzlement, or misapplication by bank officer or employee), section 657 (relating to lending, credit, and insurance institutions), section

658 (relating to property mortgaged or pledged to farm credit agencies), section 666 (relating to theft or bribery concerning programs receiving Federal funds), section 793, 794, or 798 (relating to espionage), section 831 (relating to prohibited transactions involving nuclear materials), section 844(f) or (i) (relating to destruction by explosives or fire of Government property or property affecting interstate or foreign commerce), section 875 (relating to interstate communications), section 956 (relating to conspiracy to kill, kidnap, maim, or injure certain property in a foreign country), section 1005 (relating to fraudulent bank entries), 1006 (relating to fraudulent Federal credit institution entries), 1007 (relating to fraudulent Federal Deposit Insurance transactions), 1014 (relating to fraudulent loan or credit applications), 1032 (relating to concealment of assets from conservator, receiver, or liquidating agent of financial institution), section 1111 (relating to murder), section 1114 (relating to murder of United States law enforcement officials), section 1116 (relating to murder of foreign officials, official guests, or internationally protected persons), section 1201 (relating to kidnapping), section 1203 (relating to hostage taking), section 1361 (relating to willful injury of Government property), section 1363 (relating to destruction of property within the special maritime and territorial jurisdiction), section 1708 (theft from the mail), section 1751 (relating to Presidential assassination), section 3113 or 2114 (relating to bank and postal robbery and theft), section 2280 (relating to violence against maritime navigation), section 2281 (relating to violence against maritime fixed platforms), section 2319 (relating to copyright infringement), section 2320 (relating to trafficking in counterfeit goods and services), section 2332 (relating to terrorist acts abroad against United States nationals), section 2332a (relating to use of weapons of mass destruction), section 2332b (relating to international terrorist acts transcending national boundaries), or section

2339A (relating to providing material support to terrorists) of this title, section 46502 of title 49, United States Code, a felony violation of the Chemical Diversion and Trafficking Act of 1988 (relating to precursor and essential chemicals), section 590 of the Tariff Act of 1930 (19 U.S.C. 1590) (relating to aviation smuggling), section 422 of the Controlled Substances Act (relating to transportation of drug paraphernalia), section 38(c) (relating to criminal violations) of the Arms Export Control Act, section 11 (relating to violations) of the Export Administration Act of 1979, section 206 (relating to penalties) of the International Emergency Economic Powers Act, section 16 (relating to offenses and punishment) of the Trading with the Enemy Act, any felony violation of section 15 of the Food Stamp Act of 1977 (relating to food stamp fraud) involving a quantity of coupons having a value of not less than $5,000, or any felony violation of the Foreign Corrupt Practices Act; or

(E) a felony violation of the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.), the Ocean Dumping Act (33 U.S.C. 1401 et seq.), the Act to Prevent Pollution from Ships (33 U.S.C. 1901 et seq.), the Safe Drinking Water Act (42 U.S.C. 300f et seq.), or the Resources Conservation and Recovery Act (42 U.S.C. 6901 et seq.).

(F) Any act or activity constituting an offense involving a Federal health care offense.

(8) the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

(d) Nothing in this section shall supersede any provision of Federal, State, or other law imposing criminal penalties or affording civil remedies in addition to those provided for in this section.

(e) Violations of this section may be investigated by such components of the Department of Justice as the Attorney General may direct, and by such components of the Department of the Treasury as the Secretary of the Treasury may direct, as appropriate and, with respect to offenses over which the United States Postal Service has jurisdiction, by the Postal Service. Such authority of the Secretary of the Treasury and the Postal Service shall be exercised in accordance with an agreement which shall be entered into by the Secretary of the Treasury, the Postal Service, and the Attorney General. Violations of this section involving offenses described in paragraph (c)(7)(E) may be investigated by such components of the Department of Justice as the Attorney General may direct, and the National Enforcement Investigations Center of the Environmental Protection Agency.

(f) There is extraterritorial jurisdiction over the conduct prohibited by this section if—

(1) the conduct is by a United States citizen or, in the case of a non-United States citizen, the conduct occurs in part in the United States; and

(2) the transaction or series of related transactions involves funds or monetary instruments of a value exceeding $10,000.

(g) Notice of conviction of financial institutions.—If any financial institution or any officer, director, or employee of any financial institution has been found guilty of an offense under this section, section 1957 or 1960 of this title, or section 5322 or 5324 of title 31, the Attorney General shall provide written notice of such fact to the appropriate regulatory agency for the financial institution.

(h) Any person who conspires to commit any offense defined in this section or section 1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.

18 U.S.C. § 1957. Engaging in Monetary Transactions in Property Derived from Specified Unlawful Activity

(a) Whoever, in any of the circumstances set forth in subsection (d), knowingly engages or attempts to engage in a monetary transaction in criminally derived property that is of a value greater than $10,000 and is derived from specified unlawful activity, shall be punished as provided in subsection (b).

(b)(1) Except as provided in paragraph (2), the punishment for an offense under this section is a fine under title 18, United States Code, or imprisonment for not more than ten years or both.

(2) The court may impose an alternate fine to that imposable under paragraph (1) of not more than twice the amount of the criminally derived property involved in the transaction.

(c) In a prosecution for an offense under this section, the Government is not required to prove the defendant knew that the offense from which the criminally derived property was derived was specified unlawful activity.

(d) The circumstances referred to in subsection (a) are --

(1) that the offense under this section takes place in the United States or in the special maritime and territorial jurisdiction of the United States; or

(2) that the offense under this section takes place outside the United States and such special jurisdiction, but the defendant is a United States person (as defined in section 3077 of this title, but excluding the class described in paragraph (2)(D) of such section).

(e) Violations of this section may be investigated by such components of the Department of Justice as the Attorney General may direct, and by such components of the Department of the Treasury as the Secretary of the Treasury may direct, as appropriate and, with respect to offenses over which the United States Postal Service has jurisdiction, by the Postal Service. Such authority of the Secretary of the Treasury and the Postal Service shall be exercised in accordance with an agreement which shall be entered into by the Secretary of the Treasury, the Postal Service, and the Attorney General.

(f) As used in this section --

(1) the term "monetary transaction" means the deposit, withdrawal, transfer, or exchange, in or affecting interstate or foreign commerce, of funds or a monetary instrument (as defined in section 1956(c)(5) of this title) by, through, or to a financial institution (as defined in section 1956 of this title), including any transaction that would be a financial transaction under section 1956(c)(4)(B) of this title, but such term does not include any transaction necessary to preserve a person's right to representation as guaranteed by the sixth amendment to the Constitution;

(2) the term "criminally derived property" means any property constituting, or derived from, proceeds obtained from a criminal offense; and

(3) the term "specified unlawful activity" has the meaning given that term in section 1956 of this title.

18 U.S.C. § 3553. Imposition of a Sentence

(a) Factors to be considered in imposing a sentence. -- The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider --

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed --

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for --

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, and that are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code;

(5) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2) that is in effect on the date the defendant is sentenced;

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(b) Application of guidelines in imposing a sentence. -- The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

U.S.S.G. Ch. 1, Pt. A, Comment 4(b)

(b) **Departures.**

The sentencing statute permits a court to depart from a guideline-specified sentence only when it finds "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. § 3553(b). The Commission intends the sentencing courts to treat each guideline as carving out a "heartland," a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted. Section 5H1.10 (Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status), § 5H1.12 (Lack of Guidance as a Youth and Similar Circumstances), the third sentence of § 5H1.4 (Physical Condition, Including Drug Dependence and Alcohol Abuse), and the last sentence of § 5K2.12 (Coercion and Duress) list several factors that the court cannot take into account as grounds for departure. With those specific exceptions, however, the Commission does not intend to limit the kinds of factors, whether or not mentioned anywhere else in the guidelines, that could constitute grounds for departure in an unusual case.

The Commission has adopted this departure policy for two reasons. First, it is difficult to prescribe a single set of guidelines that encompasses the vast range of human conduct potentially relevant to a sentencing decision. The Commission also recognizes that the initial set of guidelines need not do so. The Commission is a permanent body, empowered by law to write and rewrite guidelines, with

progressive changes, over many years. By monitoring when courts depart from the guidelines and by analyzing their stated reasons for doing so and court decisions with references thereto, the Commission, over time, will be able to refine the guidelines to specify more precisely when departures should and should not be permitted.

Second, the Commission believes that despite the courts' legal freedom to depart from the guidelines, they will not do so very often. This is because the guidelines, offense by offense, seek to take account of those factors that the Commission's data indicate made a significant difference in pre-guidelines sentencing practice. Thus, for example, where the presence of physical injury made an important difference in pre-guidelines sentencing practice (as in the case of robbery or assault), the guidelines specifically include this factor to enhance the sentence. Where the guidelines do not specify an augmentation or diminution, this is generally because the sentencing data did not permit the Commission to conclude that the factor was empirically important in relation to the particular offense. Of course, an important factor (*e.g.*, physical injury) may infrequently occur in connection with a particular crime (*e.g.*, fraud). Such rare occurrences are precisely the type of events that the courts' departure powers were designed to cover—unusual cases outside the range of the more typical offenses for which the guidelines were designed.

It is important to note that the guidelines refer to two different kinds of departure. The first involves instances in which the guidelines provide specific guidance for departure by analogy or by other numerical or non-numerical suggestions. For example, the Commentary to § 2G1.1 (Transportation for the Purpose of Prostitution or Prohibited Sexual Conduct) recommends a downward departure of eight levels where a commercial purpose was not involved. The

Commission intends such suggestions as policy guidance for the courts. The Commission expects that most departures will reflect the suggestions and that the courts of appeals may prove more likely to find departures "unreasonable" where they fall outside suggested levels.

A second type of departure will remain unguided. It may rest upon grounds referred to in Chapter Five, Part K (Departures) or on grounds not mentioned in the guidelines. While Chapter Five, Part K lists factors that the Commission believes may constitute grounds for departure, the list is not exhaustive. The Commission recognizes that there may be other grounds for departure that are not mentioned; it also believes there may be cases in which a departure outside suggested levels is warranted. In its view, however, such cases will be highly infrequent.

U.S.S.G. § 2S1.1. Laundering of Monetary Instruments

(a) Base Offense Level:

(1) 23, if convicted under 18 U.S.C. § 1956(a)(1)(A), (a)(2)(A), or (a)(3)(A);

(2) 20, otherwise.

(b) Specific Offense Characteristics

(1) If the defendant knew or believed that the funds were the proceeds of an unlawful activity involving the manufacture, importation, or distribution of narcotics or other controlled substances, increase by 3 levels.

(2) If the value of the funds exceeded $100,000, increase the offense level as follows:

Value (Apply the Greatest)	Increase in Level
(A) $100,000 or less	no increase
(B) More than $100,000	add 1
(C) More than $200,000	add 2
(D) More than $350,000	add 3
(E) More than $600,000	add 4
(F) More than $1,000,000	add 5
(G) More than $2,000,000	add 6
(H) More than $3,500,000	add 7
(I) More than $6,000,000	add 8
(J) More than $10,000,000	add 9
(K) More than $20,000,000	add 10
(L) More than $35,000,000	add 11
(M) More than $60,000,000	add 12
(N) More than $100,000,000	add 13.

(c) Special Instruction for Fines -- Organizations

(1) In lieu of the applicable amount from the table in subsection (d) of § 8C2.4 (Base Fine), use:

(A) the greater of $250,000 or 100 percent of the value of the funds if subsections (a)(1) and (b)(1) are used to determine the offense level; or

(B) the greater of $200,000 or 70 percent of the value of the funds if subsections (a)(2) and (b)(1) are used to determine the offense level; or

(C) the greater of $200,000 or 70 percent of the value of the funds if subsection (a)(1) but not (b)(1) is used to determine the offense level; or

(D) the greater of $150,000 or 50 percent of the value of the funds if subsection (a)(2) but not (b)(1) is used to determine the offense level.

Commentary

Statutory Provision: 18 U.S.C. § 1956.

Background: The statute covered by this guideline is a part of the Anti-Drug Abuse Act of 1986, and prohibits financial transactions involving funds that are the proceeds of "specified unlawful activity," if such transactions are intended to facilitate that activity, or conceal the nature of the proceeds or avoid a transaction reporting requirement. The maximum term of imprisonment authorized is twenty years.

In keeping with the clear intent of the legislation, this guideline provides for substantial punishment. The punishment is higher than that specified in § 2S1.2 and § 2S1.3 because of the higher statutory maximum, and the added elements as to source of funds, knowledge, and intent.

A higher base offense level is specified if the defendant is convicted under 18 U.S.C. § 1956(a)(1)(A), (a)(2)(A), or (a)(3)(A) because those subsections apply to defendants who encouraged or facilitated the commission of further crimes.

Effective November 18, 1988, 18 U.S.C. § 1956(a)(1)(A) contains two subdivisions. The base offense level of 23 applies to § 1956(a)(1)(i) and (ii).

The amount of money involved is included as a factor because it is an indicator of the magnitude of the criminal enterprise, and the extent to which the defendant aided the enterprise. Narcotics trafficking is included as a factor because of the clearly expressed Congressional intent to adequately punish persons involved in that activity.

U.S.S.G. § 2S1.2. Engaging in Monetary Transactions in Property Derived from Specified Unlawful Activity

(a) Base Offense Level: 17

(b) Specific Offense Characteristics

(1) If the defendant knew that the funds were the proceeds of:

(A) an unlawful activity involving the manufacture, importation, or distribution of narcotics or other controlled substances, increase by 5 levels; or

(B) any other specified unlawful activity (see 18 U.S.C. § 1956(c)(7)), increase by 2 levels.

(2) If the value of the funds exceeded $100,000, increase the offense level as specified in § 2S1.1(b)(2).

(c) Special Instruction for Fines -- Organizations

(1) In lieu of the applicable amount from the table in subsection (d) of § 8C2.4 (Base Fine), use:

(A) the greater of $175,000 or 60 percent of the value of the funds if subsection (b)(1)(A) is used to determine the offense level; or

(B) the greater of $150,000 or 50 percent of the value of the funds if subsection (b)(1)(B) is used to determine the offense level.

Commentary

Statutory Provision: 18 U.S.C. § 1957.

Application Note:

1. "Specified unlawful activity" is defined in 18 U.S.C. § 1956(c)(7) to include racketeering offenses (18 U.S.C. § 1961(1)), drug offenses, and most other serious federal crimes but does not include other money-laundering offenses.

Background: The statute covered by this guideline is a part of the Anti-Drug Abuse Act of 1986, and prohibits monetary transactions that exceed $10,000 and involve the proceeds of "specified unlawful activity" (as defined in 18 U.S.C. § 1956), if the defendant knows that the funds are "criminally derived property." (Knowledge that the property is from a specified unlawful activity is not an element of the offense.) The maximum term of imprisonment specified is ten years.

The statute is similar to 18 U.S.C. § 1956, but does not require that the recipient exchange or "launder" the funds, that he have knowledge that the funds were proceeds of a specified unlawful activity, nor that he have any intent to further or conceal such an activity. In keeping with the intent of the legislation, this guideline provides for substantial punishment. The offense levels are higher than in § 2S1.3 because of the higher statutory maximum and the added element of knowing that the funds were criminally derived property.

The 2-level increase in subsection (b)(1)(B) applies if the defendant knew that the funds were not merely criminally derived, but were in fact the proceeds of a specified unlawful activity. Such a distinction is not made in § 2S1.1, because the level of intent required in that section effectively precludes

an inference that the defendant was unaware of the nature of the activity.

U.S.S.G. § 5K2.0. Grounds for Departure (Policy Statement)

Under 18 U.S.C. § 3553(b) the sentencing court may impose a sentence outside the range established by the applicable guideline, if the court finds "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." Circumstances that may warrant departure from the guidelines pursuant to this provision cannot, by their very nature, be comprehensively listed and analyzed in advance. The controlling decision as to whether and to what extent departure is warranted can only be made by the courts. Nonetheless, this subpart seeks to aid the court by identifying some of the factors that the Commission has not been able to take into account fully in formulating the guidelines. Any case may involve factors in addition to those identified that have not been given adequate consideration by the Commission. Presence of any such factor may warrant departure from the guidelines, under some circumstances, in the discretion of the sentencing court. Similarly, the court may depart from the guidelines, even though the reason for departure is taken into consideration in the guidelines (e.g., as a specific offense characteristic or other adjustment), if the court determines that, in light of unusual circumstances, the guideline level attached to that factor is inadequate.

Where, for example, the applicable offense guideline and adjustments do take into consideration a factor listed in this subpart, departure from the applicable guideline range is warranted only if the factor is present to a degree substantially in excess of that which ordinarily is involved in the offense. Thus, disruption of a governmental function, § 5K2.7, would have to be quite serious to warrant departure from the

guidelines when the applicable offense guideline is bribery or obstruction of justice. When the theft offense guideline is applicable, however, and the theft caused disruption of a governmental function, departure from the applicable guideline range more readily would be appropriate. Similarly, physical injury would not warrant departure from the guidelines when the robbery offense guideline is applicable because the robbery guideline includes a specific adjustment based on the extent of any injury. However, because the robbery guideline does not deal with injury to more than one victim, departure would be warranted if several persons were injured.

Also, a factor may be listed as a specific offense characteristic under one guideline but not under all guidelines. Simply because it was not listed does not mean that there may not be circumstances when that factor would be relevant to sentencing. For example, the use of a weapon has been listed as a specific offense characteristic under many guidelines, but not under immigration violations. Therefore, if a weapon is a relevant factor to sentencing for an immigration violation, the court may depart for this reason.